92-1994

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Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1992

GEANA J. DUNKIN,
DAVID L. SMITH,

Petitioners,

v.

LOUISIANA-PACIFIC CORPORATION,
JAMES BELDIN, DAN DILWORTH, DOUGLAS EDDINS,

Respondents.

VOLUME I OF APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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ATTORNEY FOR PETITIONER

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UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

GEANA J. DUNKIN,	)	
	)	
Plaintiff-Appellant,	)	
	)	
v.	)	
	)	
LOUISIANA-PACIFIC CORPORATION, JAMES BELDIN, DAN DILWORTH, DOUGLAS EDDINS,	)	No. 92-1230
	)	
Defendants-Appellees,	)	
	)	
----------	)	
	)	
DAVID L. SMITH,	)	
	)	
Attorney-Appellant.	)	
	)	
GEANA J. DUNKIN,	)	
	)	
Plaintiff-Appellant,	)	
	)	
v.	)	No. 92-1381
	)	
LOUISIANA-PACIFIC CORPORATION, JAMES BELDIN, DOUGLAS EDDINS,	)	
	)	
Defendants-Appellees.	)	

ORDER

Filed: **February 11, 1993**

Before MOORE, TACHA, and BALDOCK, Circuit Judges.

The captioned appeals are jurisdictionally defective because the orders being appealed are not appealable before entry of final judgment.

Both appeals arise out of the same district court action. In appeal no. 92-1230, counsel for plaintiff and plaintiff appeal an order of the district court imposing sanctions on counsel for the plaintiff for violation of discovery orders. The order being appealed in No. 92-1381 imposed attorney fees on the plaintiff's counsel under Local Rule 602 C which provides that "[p]arties seeking or responding to a reconsideration of a magistrate's order should expect that attorney's fees will be awarded to the prevailing party on such review." No final judgment has been entered in the underlying action.

The law is well established in this circuit that an order sanctioning counsel currently of record is not appealable before entry of final judgment. "A sanction order against an attorney currently of record is not a final decision for purposes of § 1291 appeal where the underlying controversy remains unresolved." G.J.B. & Assoc. v. Singleton, 913 F.2d 824, 827 (10th Cir. 1990). Nor are the orders appealable under the Cohen v. Beneficial Indus. Loan Corp., 337 U.S.

541 (1949) collateral order exception to the final judgment rule. 913 F.2d at 829.

The defendants seek the imposition of sanctions pursuant to 28 U.S.C. § 1927, Fed. R. App. P. 38, and 10th Cir. R. 46.5. The plaintiff and her counsel have filed responses to the requests. See Braley v. Campbell, 832 F.2d 1504, 1514-1515 (10th Cir. 1987).

Under Fed. R. App. P. 38 "just damages and single or double costs" may be awarded when "an appeal is frivolous." An appeal is frivolous when "the result is obvious, or the appellant's arguments of error are wholly without merit." Braley v. Campbell, 832 F.2d at 1510 (citations omitted).

Sanctions are appropriate in this case. Counsel for the plaintiff not only pursued appeal no. 92-1230 after he was informed by this court of a jurisdictional defect but also filed another appeal with the identical defect. As noted above, the law is clear and well settled in this circuit regarding the appealability of these orders.

Appellee's Motion to Strike the Response of Plaintiff-Appellant and Her Attorney is denied as moot.

These appeals are DISMISSED and the cases REMANDED for a determination of reasonable attorney fees for each defendant for defending these appeals. Those fees shall be imposed against counsel

for plaintiff, but not plaintiff. See Braley v. Campbell, 832 F.2d 1512-13.

Entered for the Court
ROBERT L. HOECKER, Clerk

/s/ Ellen Rich Reiter
Deputy Clerk/Appeals Expediter

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

DUNKIN,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	92 N 243
	)	
LOUISIANA-PACIFIC, et al.,	)	
	)	
Defendants.	)	

HEARING
TRANSCRIPT OF PROCEEDINGS

Proceedings held before the HONORABLE EDWARD W. NOTTINGHAM, U. S. District Judge for the District of Colorado, beginning at 6:20 a.m. on the 9th day of July, 1992, in Courtroom C-203, United States Courthouse, Denver, Colorado.

APPEARANCES

For the Plaintiff:

David L. Smith, Esq.
1630 Welton Street, #300
Denver, Colorado 80202

For the Defendant:

Cecil Raymond Hedger, Esq.
Harding & Ogborn
1200 - 17th Street, #1000
Denver, Colorado 80202

Proceedings recorded by electronic sound recording, transcript produced by transcription service.

PROCEEDINGS

(At 6:20 a.m. on July 9, 1992, in the United States District Court at Denver, Colorado, before the HONORABLE EDWARD W. NOTTINGHAM, U. S. District Judge, with Mr. David L. Smith appearing as counsel for the plaintiff and Mr. Cecil Raymond Hedger appearing as counsel for the defendants, the following proceedings were had:)

THE COURT: 92 N 243, Dunkin versus Louisiana-Pacific Corporation and others. I'll take the appearances of counsel in this matter.

MR. SMITH: Your Honor, I'm David Smith on behalf of the plaintiff, Geana Dunkin.

MR. HEDGER: Your Honor, Cecil Hedger for Louisiana-Pacific, Douglas Eddins and James Beldin.

THE COURT: All right, there are several motions for protective order on file with the Court.

Mr. Smith, you haven't responded to any of them. Do you want to tell me what your position on all of this is?

MR. SMITH: Your Honor, as you mentioned, there are three separate motions pending for protective order. These motions are

directed basically first to a document request that I sent out back in May of 1992. There has been no productions of documents under that document request.

THE COURT: Right, because they'd like to do it under a confidentiality order.

MR. SMITH: Yes, Your Honor.

THE COURT: Do you--have you--do you object to a confidentiality order?

MR. SMITH: Yes, I do.

THE COURT: Why?

MR. SMITH: Well, the information is not confidential, and of course the burden is on the person making the motion for a protective order to show that it is confidential. This is not an oppressive document request. It's a pretty standard document request in a case of this type. I don't see that there is any ground for a protective order.

THE COURT: Well, they're asking for--you're asking for personnel files. Personnel files are sometimes regarded as confidential because they reveal information that the employees regard as private.

MR. SMITH: Your Honor, the defendants' counsel has not permitted me to see any of this information. I have no idea whether there is confidential documentation in any of these files or not.

THE COURT: Well, I have an idea whether there's confidential information. If it's personnel information about other people, then it's regarded as private, Mr. Smith. How would you like to have somebody reaming through your personnel file, or the personnel files of the employees of your office?

MR. SMITH: Your Honor, I would submit that 99.9 per cent of the information to which this motion for a protective order has been made is not confidential information.

THE COURT: Well, some of it is. The personnel files are confidential information. Medical records are confidential information.

MR. SMITH: Your honor [sic], I have sent out a set of interrogatories that have never been responded to. We can't even get the names of the people who counsel is saying their personnel files and medical records, as you have identified, should be turned over. We don't--we can't even get the names of the people involved. There has been no response to discovery in this case from the defendants.

THE COURT: All right. Do you have anything else to say?

MR. SMITH: In addition to the documents, there is a motion for protective order relating to the depositions also. The depositions have been totally stopped in this case because even though we have a discovery schedule setting all of these depositions, that counsel refuses

to go forward with them. And so the motion for protective order is not only related to these documents. It goes to the depositions--

THE COURT: Well, Mr. Smith, let me ask you a question about the depositions. Did you call Mr. Hedger before you scheduled 34 depositions to commence on July 9th, I guess it is, or whenever it was, July 6th at 9:00 a.m. and continue thereafter until completed? did you call him before you did that?

MR. SMITH: Your Honor, we entered into--that deposition notice was set pursuant to our stipulated discovery and scheduling order.

THE COURT: You know, I don't know how you understand these orders, Mr. Smith. When I enter a stipulated scheduling and discovery order that sets forth a list of depositions that you can take, that doesn't mean that you're entitled without so much as a "is it convenient for you, can you do it those days, are you on vacation" to opposing counsel and send those out and set them for a day certain, that doesn't mean that.

Is there anybody whose practiced in this court any length of time who thinks you can get away with that kind of thing?

All right, here's what I'm going to do. The motions for protective order are granted in whole.

Mr. Smith, it is my finding based on the materials in the file, based on the fact that you didn't call Mr. Hedger before scheduling any of those depositions, based on the fact that you have scheduled 34 depositions to start on July 6th and to "continue during reasonable time periods thereafter until completed at the offices of plaintiff's attorney," et cetera, based on the fact that you won't agree to any confidentiality order with respect to document requests that include medical records and personnel files and other files that are properly regarded as private, it is my request--it is my finding that you are engaged in a persistent course of harassment and discovery abuse.

You are not going to be permitted any discovery in this case until you justify it to a United States Magistrate. In other words, before you set a single deposition in this case, you are going to tell the magistrate why it is that you need to take that deposition and why that deposition--why you can't get the discovery by other means and why that deposition is necessary.

This case is a straightforward simple Title 7 case. It is practically unheard of to schedule 35 or 40 depositions in a case such as this. I think you're just harassing the defendant, and if you're not, then you can justify your position to the United States Magistrate. Is that clear?

MR. SMITH: Yes, Your Honor.

THE COURT: The defendant is awarded all of its costs and attorneys fees on all of these motions.

Mr. Hedger, you will file that by--your request for costs and attorneys fees by Monday the 13th of July. If there's any necessity for a hearing, I'll hear this on the 16th of July at 6:00 a.m.

MR. HEDGER: Yes, Your Honor.

(6:30 a.m. - Whereupon, the hearing was concluded.)

I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

July 14, 1992

/s/ Mary C. Chevalier
Federal Reporting Service, Inc.
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Aurora, Colorado 80013
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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

GEANA J. DUNKIN,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	92 N 243
	)	
LOUISIANA-PACIFIC CORPORATION, et al.,	)	
	)	
Defendants.	)	

HEARING - ATTORNEY FEES
TRANSCRIPT OF PROCEEDINGS

Proceedings held before the HONORABLE EDWARD W. NOTTINGHAM, U. S. District Judge for the District of Colorado, beginning at 6:40 a.m. on the 16th day of July, 1992, in Courtroom C-203, United States Courthouse, Denver, Colorado.

APPEARANCES

For the Plaintiff:

David L. Smith, Esq.
1630 Welton Street, #300
Denver, Colorado 80202

For the Defendants:

Cecil Raymond Hedger, Esq.
Harding & Ogborn
1200 - 17th Street, #1000
Denver, Colorado 80202

Proceedings recorded by electronic sound recording, transcript produced by transcription service.

PROCEEDINGS

(At 6:40 a.m. on July 16, 1992, in the United States District Court at Denver, Colorado, before the HONORABLE EDWARD W. NOTTINGHAM, U. S. District Judge, with Mr. David L. Smith appearing as counsel for the plaintiff and Mr. Cecil Raymond Hedger appearing as counsel for the defendants, the following proceedings were had:)

THE COURT: Case 92 N 143, Dunkin versus Louisiana-Pacific Corporation. This is the final case that I have. Am I missing something? I see other people in the courtroom. Are you here on one of these two cases?

All right, I'll take the appearances of counsel in this matter.

MR. SMITH: Good morning, Your Honor. David Smith on behalf of the plaintiff.

MR. HEDGER: Your Honor, Cecil Hedger on behalf of Louisiana-Pacific, Douglas Eddins and James Beldin.

THE COURT: All right. The matter is here on several related motions. Let's take up the motion for approval of attorney's fees. I believe that the plaintiff objects to that. Is that correct, Mr. Smith?

MR. SMITH: Yes, Your Honor.

THE COURT: All right. Mr. Hedger, do you have any further information or proof that you wish to present to the Court on the matter of your attorney fees?

MR. HEDGER: Your Honor, I'm prepared to call Mr. Bernie Siebert as a witness with respect to the amount of time as set forth in the motion and affidavit in terms of reasonableness, as well as the hourly rate that's set forth in the motion for reasonableness, and I'm prepared to make an offer of proof if the Court would allow. I have my original handwritten daily diaries that I would share in camera with the Court. I have the computer printout of the time involved with respect to June 17 forward through July the 10th, part of which is redacted, but I would share the original with the Court if it would become necessary.

The time expended and set forth in the motion for the affidavit was my time only, Your Honor. I did not ask this Court to award fees with respect to Mr. Tishie's involvement in Spokane, Washington, co-counsel for Louisiana-Pacific. I did not, Your Honor, ask for any time with respect to associate involvement, particularly in light of the Chinese exercise, if you will--and I don't mean that as a criticism for our friends across the Pacific--but July the 1st and the 2nd was incredible trying to find out who was subpoenaed and who was

going to appear and to attempt to find out from Mr. Smith what was going on on the thing. And that's 3.6 hours of my time.

I had legal assistants trying to call witnesses that were listed on these notices of deposition, and I had an associate lawyer. Additionally, I've had research costs involved that were not requested in my motion and affidavit for purposes of preparing at least the first protective order concerning confidentiality, et cetera, and I'm prepared to make an offer of proof or I'm prepared to call a live witness and offer exhibit testimony.

THE COURT: Well, your representation is that the Exhibit A to your affidavit that was filed on July 13th is based on detailed contemporaneous time records?

MR. HEDGER: That is correct, Your Honor, and I have those records in the court for the Court's opportunity to inspect and review.

THE COURT: Well, I take it that you're not offering to give them to plaintiff's counsel because your contention is they contain privileged information?

MR. HEDGER: That is correct, Your Honor.

THE COURT: Well, Mr. Smith, do you dispute that he kept detailed time records?

MR. SMITH: Your Honor, I don't have enough information to admit or dispute that matter--admit or deny.

THE COURT: All right, you'd better proceed with your proof, Mr. Hedger.

MR. HEDGER: By an offer of proof or with my witness?

THE COURT: Well, I think--start out with your witness, why don't you.

MR. HEDGER: Your Honor, at this time, defendants would call Mr. Bernie Siebert.

WALTER V. SIEBERT

was called as a witness herein and, having been first duly sworn, was examined and testified as follows:

THE CLERK: State your name for the record, and please spell your last name.

THE WITNESS: It's actually Walter V. Siebert, S-i-e-b-e-r-t.

DIRECT EXAMINATION

BY MR. HEDGER:

Q Do you go by any other name, Mr. Siebert?

A Yes, Bernie.

Q Bernie? Would you state your business address for the record, sir?

A 633 - 17th Street, Suite 3000, Denver, Colorado 80202.

Q Are you currently employed?

A Yes.

Q By whom?

A Sherman and Howard.

Q In what position, sir?

A I'm a partner there.

Q How long have you been a partner at the law firm of Sherman and Howard?

A Nine years.

Q Would you please describe briefly your educational background and legal work background to the Court?

A I graduated from, undergraduate, from the University of Nebraska in 1970 with a Bachelor of Arts degree in political science. I received my law degree from the University of Nebraska in 1972. In 1973, I commenced work as general counsel for Mountain States Employers Council doing strictly labor and employment work, became a partner at Sherman and Howard in '83, and again my work is limited 99 per cent to labor and employment work.

Q Mr. Siebert, have you, in the course of concentrating or focusing your expertise in labor and employment work, been involved in

the defense of litigation under Title 7 of the Civil Rights Act of 1964 as amended?

A Yes.

Q Could you describe briefly to the Court your involvement in that type of defense of Title 7 litigation?

A I couldn't estimate how many cases I've been involved in in terms of trials, probably 20 or more.

Q Mr. Siebert, have you ever testified as an expert in any state or federal court concerning reasonableness of attorney fees?

A Yes, I believe I did. I apologize, I don't remember the exact case, but I think I testified for Rod Smith in a case, but that was a number of years ago.

Q In what court was that testimony given, Mr. Siebert?

A I believe federal district court.

MR. HEDGER: Your Honor, at this time, I'd offer Mr. Siebert as an expert with respect to the fee application as set forth in the motion and affidavit.

THE COURT: All right. Mr. Smith, do you have objection?

MR. SMITH: No objection, Your Honor.

THE COURT: All right, you may proceed, Mr. Hedger.

Q (by Mr. Hedger) Mr. Siebert, have you had an opportunity to become familiar with the basic dispute in this action, and more particularly, the discovery dispute which led to the defendants filing three separate motions for a protective order?

A Yes, I have.

Q Describe to the Court specifically please, Mr. Siebert, what you did in order to review these matters prior to the hearing here today.

A Counsel provided me with copies of various documents, and I reviewed prior to today the complaint and answer, the stipulated scheduling and discovery order, plaintiff's first request for production of documents to defendants, defendants' response to plaintiff's first request for production of documents, motion for protective order requiring confidentiality agreement prior to inspecting documents requested to be produced, together with an Exhibit A, the proposed stipulation and order protecting confidential information.

I reviewed defendants' motion for protective order and for attorney's fees, plaintiff's notice to take depositions--that was the document that was filed or submitted on June 30 for the 30 plus deponents--the motion for protective order, a minute order scheduling the July 9 hearing issued by this Court, a memorandum to the file from Mr. Hedger regarding this Court's ruling on July 9th, plaintiff's request

for approval of discovery requests, plaintiff's motion for reconsideration, motion to compel and/or for sanctions, and certificate of compliance with Local Rule 403(g), defendants' response to plaintiff's request for approval of discovery, defendants' motion for approval of attorney's fees with affidavit, plaintiff's response to motion for approval of attorney's fees with affidavit, and plaintiff's request for sanctions pursuant to Federal Rule of Civil Procedure 11, and defendants' response to plaintiff's motion for reconsideration.

I also reviewed the complete contemporaneous time records kept by Mr. Hedger, and I also reviewed the redacted time records, as well as obviously the affidavit in support of the motion for attorney's fees.

Q Mr. Siebert, based upon your review of the materials that you've just testified to and based upon your 20 some odd years, or thereabouts, or practice in the employment and labor law field, do you have an opinion as to the reasonableness of the time devoted to the three motions for protective order?

A Yes.

Q What is that opinion?

MR. SMITH: Your Honor, I'm going to object to a line of questioning that asks him if he has an opinion as to the amount of time,

whether a specific amount of time is reasonable. That's really not a matter for an expert opinion. That's a factual matter that the trier of fact should determine, and I would object that that's not a proper matter for an opinion by an expert witness.

THE COURT: Overruled.

THE WITNESS: I'm sorry?

THE COURT: Overruled. You may answer.

A Yes. Give me just one moment, if I can find that document.

Q (by Mr. Hedger) Are you looking for the motion, Mr. Siebert?

A I was looking for, yes, defendant's--

MR. HEDGER: May I approach the witness, Your Honor.

THE COURT: Yes.

A Well, that's all right. I don't have it in front of me. I did review it, Your Honor. I did review the affidavit of Mr. Hedger. I did review, as I mentioned, the hours that Mr. Hedger lodged for that attorney fee request. I reviewed the contemporaneous records that Mr. Hedger kept, and I reviewed the redacted portions that he referred to in his statements to the Court made this morning.

It is my opinion that the hours expended by Mr. Hedger were reasonable, especially taking into account that those hours are solely Mr. Hedger's. He did not include time spent by any associates,

legal assistants or law clerks or, if appropriate, which I'm not sure, but he certainly didn't include any time spent by in-house counsel or any other outside counsel that represents the defendant.

THE COURT: All right.

Q (by Mr. Hedger) Mr. Siebert, could you describe for the Court what factors you consider in determining whether an hourly rate for legal service is reasonable?

A My primary consideration is what I view to be the market rates or the range of rates in the market. I view certainly the level of experience of the attorney involved, the knowledge of that attorney, that attorney's expertise in a particular area, that particular attorney's reputation and the quality of that person's work.

Q Mr. Siebert, would you mind sharing with the Court what your normal hourly billing rate is in your practice at Sherman and Howard in the employment labor law field?

THE WITNESS: Do I have to answer that, Your Honor?

THE COURT: I think it's a proper question.

A $225.00 an hour.

Q (by Mr. Hedger) Thank you, Mr. Siebert.

Mr. Siebert, do you have any personal knowledge of the reputation and standing of myself in the labor relations community in Denver, Colorado?

A Yes.

Q And what is that knowledge, Mr. Siebert?

A Well, the basis of my knowledge is the fact that our firm has worked with Mr. Hedger on several projects over the years. I've been personally acquainted with Mr. Hedger and have been involved with him in projects over the years. Mr. Hedger is a frequent speaker at seminars, represents many associations and his reputation as being one of the city's better employment law attorneys.

Q Mr. Siebert, do you have an opinion as to the $175.00 an hour that I have requested in my motion and affidavit for fees in this matter?

A Yes.

Q What is that opinion?

A That that is a reasonable rate.

MR. HEDGER: Your Honor, may I approach the witness?

THE COURT: Yes.

Q (by Mr. Hedger) Mr. Siebert, I've handed you what has been marked for identification as Defendant's Exhibit A, and ask that you examine that document, please. And as you examine that document, if

you could, is that a copy of Harding and Ogborn's computer billing statement with respect to time entries that I shared with you for purposes of this hearing today?

MR. SMITH: Objection, Your Honor. I don't think this witness can identify this document on that basis.

THE COURT: Overruled.

A this [sic] is a document that I previously reviewed and previously testified concerning the redacted computer diary entries.

MR. HEDGER: Mr. Case, could you ask the witness to examine Defendant's Exhibit B?

And for the record, Your Honor, Exhibit A is time entries from June 17th through the end of June.

MR. SMITH: Objection, Your Honor. I don't know what that reference is. What are we doing? Is counsel now identifying the document or is the witness identifying the document?

THE COURT: Well, he was--I thought the witness was identifying the document as something that he had considered in forming his opinion. I suppose, if you insist, that counsel will eventually need to be sworn. That can be done, Mr. Smith.

Q (by Mr. Hedger) Mr. Siebert, handing you a document that's been marked for identification as Defendant's Exhibit B, an [sic] ask that you examine that, and if you can, could you identify it?

A Yes, this is again the same as Exhibit A, however, the dates are from July 1 through July 10. Again, these are partially redacted computer or typewritten entries of time and billings.

MR. SMITH: Objection, Your Honor. The witness does not have personal knowledge.

THE COURT: He can tell what--that's all they were represented to him to be and that's the basis for his opinion, Mr. Smith. That's all he's saying. Objection overruled.

Q (by Mr. Hedger) Mr. Siebert, how much time have you devoted to reviewing documents, visiting with me and preparing for this hearing today?

A I would estimate approximately two and a half hours between telephone calls, reviews of documents and meeting with you this morning.

MR. HEDGER: Your Honor that's all that I have at this time.

THE COURT: You'll be charging him at 225 an hour or have you settled that yet, or do you know?

THE WITNESS: No, Your Honor, we haven't settled that yet.

THE COURT: All right. In the event that there were an award, I would think that you'd be entitled to get something out of this hearing.

MR. HEDGER: And the defendants when it's appropriate, Your Honor, will so request of the Court that that be allowed.

THE COURT: Well, I'd like to get it wrapped all at once. We can come back here at 6:00 a.m. for a couple of months, which I'm sure we will do if that's what happens. Go ahead, Mr. Siebert.

THE WITNESS: I was just going to say I really, since it's not an issue, I certainly don't want to hold the Court up and I'd be happy to waive any fee to--

THE COURT: Well, that's up to you and Mr. Hedger.

THE CLERK: Are we moving A and B?

MR. HEDGER: Your Honor--excuse me. Thank you, Mr. Case.

At this time, request--move for admission of Defendant's Exhibit A and Defendant's Exhibit B.

THE COURT: All right. Is there objection?

MR. SMITH: Other than the authenticity objections I've already made, no, Your Honor.

THE COURT: All right. I'm not going to receive them right now because even though he relied on them, that doesn't mean that they're--they've been authenticated for purposes of admission. If there's a dispute, and it appears there is, Mr. Hedger, then I'm afraid you're going to have to be sworn and testify, evidently in narrative fashion, which I will permit.

Anything further of Mr. Siebert on direct?

MR. HEDGER: I have no further questions at this time, Your Honor.

THE COURT: Cross-examination, Mr. Smith?

CROSS-EXAMINATION

BY MR. SMITH:

Q Mr. Siebert, when you first began your testimony a few minutes ago, you gave a long list of documents that you had reviewed prior to your coming here to testify today. One of the documents that you mentioned, and I can't give you the exact words you used, but I believe it was something like memo to file regarding ruling by Mr. Hedger. Do you recall that document?

A If I said that, I misspoke. I think I said a memo to the file from Mr. Hedger regarding this Court's rulings.

Q Do you have a copy of that document with you?

A Yes.

Q May I see that document, please?

MR. SMITH: May I approach the witness, Your Honor?

THE COURT: You may.

Q (by Mr. Smith) Mr. Siebert, this document is in the form of a question and answer, or a colloquy between Judge Nottingham and myself, Mr. Smith; is that correct?

A And I believe Mr. Hedger.

Q What is the source of this information?

A I have no idea. I just was given the document. I have no idea what the source of it is.

Q Does this--is this a document that in some way pertains to the July 9, 1992 hearing that was held in this case?

A That's what the document represents.

Q All right. Mr. Siebert, what do you know in terms of the identity of the deponents that were the subject of the motions for protective orders in this case?

A Mr. Smith, I'm not sure I understand your question.

MR. HEDGER: Your Honor, I'm going to object. This is way--number one, I don't understand the relevance of the question. But

number two, it's way beyond anything that I raised on direct examination, or it's going to be here shortly.

THE COURT: I think it will be shortly. I'll allow that one question.

A I'm sorry, Mr. Smith, I don't understand what you mean by what do I know about these people.

Q (by Mr. Smith) Do you know who the deponents were?

A Only from the pleadings that I have. I certainly don't know them personally. I know from the pleadings that you attempted--there was some dispute over two depositions involving whether documents needed to be produced in advance--

Q No, I'm not talking about the documents. I'm talking about the identity of the deponents. Do you know that the deponents who were the subject of these protective orders included three of the defendants in this case?

A Two, I believe.

Q Isn't it true that the depositions that were the subject of the protective order included Defendant Louisiana-Pacific Corporation, as well as Defendants Douglas Eddins and James Beldin?

A That's correct. I think there was a 30(b)(6) witness.

Q Do you know whether prior to the filing of these motions for protective order there was any stipulation between counsel, that is, Mr. Hedger and myself, regarding whether those depositions should be taken?

A My review of the documents show there was a stipulation as to an initial date for those depositions to be taken, yes. Is that what you're asking?

Q What documentation are you referring to there?

A I think there was some correspondence attached to a couple of the motions regarding the scheduling, and there was references that agreement had been reached between counsel as to the dates. I think there was--I apologize--but I believe a June 23 date and one other date that were set for depositions.

Q So it's your understanding from the documentation that you have reviewed that there was in fact an agreement that those depositions of those defendants would be taken on a date certain and at a time certain; isn't that correct?

A Initially, that's correct.

Q What do you mean by initially?

A Well, my understand, again, my interpretation of the correspondence was that you wanted certain documents to be produced

prior to those depositions. There was a dispute over the confidentiality order. It appeared to me then that there was some representation that the depositions would have to be split, in other words, you would start on that day, but subject to getting the documents, that there may be an additional day of depositions.

Q Well, what are you referring to for that information?

A There's a motion for protective order that was filed with the Court on June 10.

Q Well, no, I'm speaking of prior to the motions for protective order, is there any documentation that you are referring to that would indicate that the dates that Mr. Hedger and Mr. Smith agreed to were in some way conditional?

A Prior to my reviewing that document and the correspondence attached to it? No.

Q Well, what correspondence attached to it that refers to an earlier time indicates that those dates were in any way conditional?

A I'm sorry, could you repeat your question again, please?

Q What documentation are you referring to in the file which would indicate to you that prior to the filing of the motions for protective order, that the dates that Mr. Hedger and Mr. Smith had agreed that the

depositions of the defendants would be taken were in any way conditional?

A I don't think they were initially conditional. I think it became--the dates became an issue when the document and confidentiality provision became an issue.

Q And who made that an issue?

A Well, you know, objectively from the documents, it appears that Mr. Hedger on behalf of his client requested that you enter into a confidentiality order.

Q So isn't the answer that Mr. Hedger made that--

A Yes, Mr. Hedger was the one who proposed the confidentiality order.

Q And this was after counsel had entered into the stipulation that the depositions of the defendants would be taken on a date certain; isn't that correct?

A I'd have to double check which dates. I think--yes, I believe so. The scheduling order had the deposition of--the three depositions that you mentioned, if I'm reading this correctly.

Q And isn't it also true that sometime after Mr. Hedger and Mr. Smith determined that these depositions of the defendants would be taken on a date certain, that that information was placed in the form of a

proposed stipulated scheduling and discovery order for the Court's signature?

A If you're asking me was the--

Q I'm asking you whether that was reduced to that document.

A Well, the scheduling order says that the depositions--in Paragraph, it looks like 4C(2)(3), speak to the issue of the scheduling of those depositions.

Q And that document was signed not only by Mr. Hedger and Mr. Smith, but also by the Court; isn't that correct?

A Yes, it appears the Court signed the document on the 28th of May.

Q And isn't it true that that document confirms or ratifies what was previously agreed to between Mr. Hedger and Mr. Smith, despite the fact that Mr. Hedger was by that point raising the possibility that he wanted to have the plaintiffs sign a confidentiality agreement?

A I apologize, Mr. Smith, you kind of lost me on that one. Could you repeat the question?

MR. SMITH: Could I have the question repeated? I don't know if I can state it exactly that way.

THE COURT: No.

Q (by Mr. Smith) Isn't it true that that information was placed in the stipulated pretrial--or stipulated discovery and scheduling order signed by Mr. Hedger and Mr. Smith and the Court, even though that after the stipulation between Mr. Smith and Mr. Hedger, Mr. Hedger had raised his question as to whether Mr. Smith's client and himself should not be required to sign a confidentiality agreement?

MR. HEDGER: Your Honor, I'm going to object on the basis of lack of foundation. This witness does not know communications--unless he can lay foundation--but communications between myself and Mr. Smith concerning the issue of confidentiality that commenced way back early in May.

THE COURT: Well, the witness can answer whether he knows or not. The objection is overruled.

A I don't know. All I reviewed, Mr. Smith, were the documents. And I apologize, I--

Q (by Mr. Smith) Well, give me the sequence of events as you understand it relating to the stipulation between Mr. Smith and Mr. Hedger, second, Mr. Hedger's requirement, unilateral requirement, that a confidentiality agreement be signed and, third, the signing by counsel and the Court of the stipulated discovery and scheduling order. What is your understanding of the sequence of events?

A Mr. Smith, I don't know when conversations were initiated concerning discovery, the scheduling of discovery. I don't know when conversations were initiated concerning a confidentiality order. Again, I haven't--I just have no knowledge of those. The only thing I have is the--basically the documents that are in the Court's file, I presume. So I just can't testify as to when particular things took place. I can tell you when the scheduling order was signed.

Q And you can tell me when the protective order was signed; correct? Was made by counsel, that is.

A The confidentiality order?

Q The protective order, the motion for protective order.

A Yes, I can tell you when that was filed.

Q Does it make any difference to you as an expert witness that at the time that Mr. Hedger filed his motion for protective order with respect to the depositions of the defendants, that there was in fact a stipulated scheduling and discovery order signed by himself and opposing counsel and the Court with reference to those depositions?

A Mr. Smith, believe me I don't mean to be evasive, but my testimony really has gone to the issue of the fees requested by Mr. Hedger, and my opinion has gone to the area of the reasonableness, his reputation in the community, the reasonableness of the hours

expended. If you'd like me to comment on what's transpired in this case, I'd be most happy to do so, but I'm not sure that you really want that.

MR. SMITH: Well, Your Honor, the line of questioning I'm going down here, obviously it makes a big difference with respect to the reasonableness of the hours and the fees as to whether the motion for protective order was justified in the first place. I have a motion pending before the Court for reconsideration of that matter. I have asked for the Court to consider that matter, the reconsideration, before going into the attorney's fees issue. That's what makes logical sense to me. But here we are on the attorney's fee portion of it.

I believe that whether that protective order had good grounds to it is a crucial issue in determining whether the attorney's fees were reasonable or not, and I believe I have the right to ask the witness whether, in his determination of reasonableness, he took into consideration whether the protective order was well grounded from the beginning. And I know that that was not the basis of his original testimony regarding the reasonableness of this, but I am asking him a different question than Mr. Hedger asked him.

THE COURT: There was no objection to the question. The witness answered the question, and you made a speech.

MR. SMITH: Your Honor--

THE COURT: So I don't think any response is called for by me.

MR. SMITH: I would ask to check the record on that. The witness--

THE WITNESS: Well, I'd be happy to restate my answer.

MR. SMITH: --has not answered the question.

THE COURT: I think the witness answered the question, and asked you if you wanted to have him comment on the course of what happened here.

MR. SMITH: Maybe I can clarify my question then, because did you think that you had answered the question, Mr. Siebert?

THE WITNESS: Why don't we just start again and maybe we can--because I wasn't--I don't think I answered your question, but let's--

MR. SMITH: I didn't feel you answered the question, and I would like to ask it again and see if I can get an answer to it.

A Let me just tell you, if I understand your question correctly, you're asking me to comment or express my opinion as to the propriety of the protective ordered entered by this Court.

Q (by Mr. Smith) As to whether that would have any bearing on the number of hours that should have been spent with respect to this matter.

A The fact that the motion was granted?

Q No, the fact that the--whether the basis for the motion was sound enough for Mr. Hedger to have spent 23.2 hours on that motion.

A I guess I kind of feel like the Tenth Circuit here, but I think it's--

Q Well, let me rephrase the question.

A It's rather apparent--

Q Let's get into--let me re-ask the question. Apparently you're not following where I'm going with this.

Does the validity or the soundness of the motion that Mr. Hedger filed, that is the motion for protective order, in your opinion have any bearing on the number of hours that should have been spent in preparing that motion and doing all of the other things that Mr. Hedger says that he did with respect to this motion?

A Well, I guess--

Q Does it have any bearing?

A I wouldn't be here, Mr. Smith, if the Court had not granted his motion, because the only reason I'm here--

Q All right, we understand that the Court granted the motion. There is a motion for reconsideration pending, however.

A Would you like--

Q And I'm asking you whether the soundness of the motion has any bearing on the reasonableness of the number of hours that Mr. Hedger expended with respect to that motion and related items?

A No, because I don't think, if I understand your question correctly, I don't think Mr. Hedger's bills and time spent are based on the success of the motion. They're merely accurate time records of how much time Mr. Hedger spent preparing for that motion.

Q You mean if this had been a frivolous motion, Mr. Hedger still would have had--would have been justified in spending 23.2 hours on it because that's just the time that he billed on that motion; right?

A Well, had it been a frivolous motion, I wouldn't be here testifying as to it. You'd probably have an expert of your own up here. But it's a matter of how much time was spent on the motion, obviously, the amount of legal research, the amount of work that went into the preparation of that motion, and my understanding is the question is was that time reasonable, and I said yes.

THE COURT: All right. Mr. Smith, you're going to conclude your cross-examination of this witness in the next ten minutes. And at the end of the ten minutes, you will sit down.

MR. SMITH: Thank you, Your Honor.

Q (by Mr. Smith) As far as you're concerned, does the stipulated scheduling and discovery order have any bearing on the number of hours that Mr. Hedger should have spent on these motions and related items?

A No.

Q The fact that the Court and counsel agreed on a scheduling order for these depositions has no bearing on whether a motion for a protective order should have been made to stop those depositions?

THE COURT: You certainly should not include the Court in that agreement, Mr. Smith, because that's not the way I interpret that scheduling and discovery order.

MR. SMITH: Well, I maybe did misstate myself.

Q (by Mr. Smith) What I meant to say that there was a stipulated scheduling and discovery order signed by counsel. That order was also signed by the Court.

A The Court obviously approved of the order that the parties had agreed upon, would be my interpretation of that. A Rule 16 scheduling

and discovery order is, in my view, an outline of what is to transpire in the time deadlines set on that so that the parties and the Court can properly manage the case and move that case along in an orderly fashion.

Q Are the parties supposed to follow that scheduling order?

A Certainly with respect to the time limitations and any limitations that might be set forth.

Q And if Mr. Hedger's motion for protective order was based on the fact that he just didn't want to go forward with the depositions that the parties had already agreed to--

MR. HEDGER: Your Honor--

Q (by Mr. Smith) --what is your opinion of that?

THE COURT: It certainly assumes a fact not in evidence, and the objection is sustained.

MR. SMITH: May I supply the fact to the witness, who is an expert and can testify regarding a hypothetical matter?

THE COURT: Oh, certainly.

Q (by Mr. Smith) Would you answer the question on that basis, please?

THE COURT: In other words, if Mr. Hedger had just decided he wanted--didn't want to go through with the depositions. Is that your question?

MR. SMITH: Yes, Your Honor.

A If Mr. Hedger merely decided he didn't want to go through with the deposition, I'm not sure that that would necessarily violate the scheduling order, but I think it would certainly be proper for an appropriate motion to compel the discovery.

Q (by Mr. Smith) Have you reviewed the document request that was the basis of the motion for protective order?

A Yes.

Q Have you reviewed the documents themselves?

A No, I have not.

Q Can you tell from looking at that document request whether those documents requested included confidential information?

MR. HEDGER: If the witness knows, Your Honor. A I can't--I can tell you, Mr. Smith, I have not examined the documents. I can tell you from my experience in my opinion that many of the documents that you requested I would consider to be confidential documents.

Q (by Mr. Smith) Without looking at the documents? A I-- personnel files, medical records, some of the documentation that you requested on--

Q All of the documents in those particular files you're mentioning are confidential; is that your testimony?

A I don't know what all documents are contained in them. I am saying from my perspective--

Q From those categories of documents that have been mentioned, you can tell that those documents are or are not confidential information?

A I would take the position that medical files, personnel files are confidential information, yes.

Q All of those documents; is that correct?

A Well, I don't know what all documents are included in there, but as a generic category, I would say that personnel files, medical records, those types of information where employees have some expectation that those documents will be held in confidence by the employer, that those documents are confidential.

Q Does a person making a motion for a protective order have any obligation to come forward with those documents to show the Court that those documents are in fact confidential, or is that just something the

Court's supposed to guess at? A Well, I think in my experience, Mr. Smith, most courts are well aware generically of what types of documents are kept in personnel files. Certainly most courts are well aware of the expectation of privacy, and unless there is some personnel policy or other notice to employees that their files and personal documents will not be kept confidential, I think there is a presumption of confidentiality.

THE COURT: Let me ask you a related question, Mr. Siebert. In your experience, do you frequently encounter attorneys on the other side who refuse to sign confidentiality orders?

THE WITNESS: Again, it's usually a matter of negotiation, 90 per cent of the time. There are some clients that our firm represents that are involved in a lot of government work. In those kinds of cases, Your Honor, we seek and usually are successful in obtaining extremely broad confidentiality orders in those types of cases. I don't recall any case where I have requested a confidentiality order where the other side has not complied. Now, not to mislead the Court, that may not be what--the document that gets executed may not be the original draft I sent, but there is certainly some negotiation involved.

THE COURT: But it's usually negotiated between counsel?

THE WITNESS: Absolutely.

THE COURT: All right. Mr. Smith?

Q (by Mr. Smith) Aside from the negotiations, what are the rules about requiring an opposing party to sign a confidentiality agreement? Is there any such rule?

A My practice has always been, Mr. Smith, that I seek to work that out with opposing counsel.

Q No, I understand that. You just testified to that.

A And absent some agreement, then I will ask the court to impose a confidentiality order.

Q On what basis?

A On what basis?

Q Yes. On the basis, I assume, that the information is confidential; correct?

A Yes.

Q Does that obligate--

THE COURT: All right, Mr. Smith, your ten minutes is up. Have a seat.

Any redirect?

MR. HEDGER: Just very short, Your Honor.

REDIRECT EXAMINATION

BY MR. HEDGER:

Q Mr. Siebert, you were asked as to whether or not you could opine on the confidentiality of the documents that are at issue in this case, and you indicated in your testimony your experience being personnel files, medical records being confidential. My question, sir, is what, in your experience, has been your posture in Title 7 litigation when a request is being made to a client of yours for all information concerning affirmative action plans and underlying EEO-1 data?

A The first thing that I always look at is how broad is the scope. Obviously, many of the clients that our firm represent operate on a national basis, so the geographic scope becomes an important issue as to how far flung it is, and that often is dependent upon the actual issues involved in the case. With respect to the other types of documents you mentioned, obviously every case has certain requests that come forward, but generally affirmative action plans, EEO information, OSHA-200 reports, personnel files, medical records, those types of requests where the information is sensitive, where the information is not that which you care to have broadcast to the world, again, those are the types of items or categories of requested documents for which confidentiality orders are normally sought.

MR. HEDGER: No further questions, Your Honor.

THE COURT: Do you have any experience with OSHA?

THE WITNESS: Yes, Your Honor.

THE COURT: Is there sensitivity with respect to OSHA information?

THE WITNESS: Some of the reports--several years ago, OSHA changed their inspection rules, and unless--there's a log that must be kept of all lost time injuries that's required by OSHA. There is--then inspections are conducted based on the fact that your lost time injury ratio exceeds a certain amount. They're really almost tantamount to workers comp. files because they involve on the job injuries. That's primarily what OSHA is concerned with, is safety in the work place. So it's on the job injuries, the causes for those, what type of actions have been taken to prevent those, those types of inquiries. And, again, depending on the case, Your Honor, obviously if it's an OSHA case, the OSHA records become more important than if it's a workers comp. case. Even that might be marginally acceptable in terms of trying to find out other employees who were injured on the same basis. But normally you can narrow or tailor down responses, again, based on conference with opposing counsel to provide that information in some form other than the actual documents that are requested.

THE COURT: All right, you may step down.

Mr. Hedger, do you have any other witnesses? And it sounds as though, for purposes of authentication, you may have to take the stand yourself. I don't know whether you want Exhibit A and Exhibit B admitted, but they are not admitted at this point, nor do I know exactly what they are. I know that they form part of the basis for Mr. Siebert's opinion.

MR. HEDGER: May I ask the--make an inquiry of the Court? If I do take the stand, what does that do in terms of my representation of the defendants in this matter?

THE COURT: Well, we're at an awkward situation, and I have never encountered this before where the attorney on the other side refuses to stipulate to the records. And if he refuses to stipulate, I can't admit those records over his objection. In terms of what it does to your representation of the defendants, I don't think you have to withdraw from representation just because you're testifying on a matter of authentication. I think the code of conduct that governs attorneys in this court is fairly clear on that, nor do I think you're waiving any privilege.

MR. HEDGER: I'll be sworn and will authenticate the documents, Your Honor.

THE COURT: All right.

CECIL R. HEDGER

was called as a witness herein and, having been first duly sworn, was examined and testified as follows:

THE CLERK: State your name for the record, and please spell your last name.

THE WITNESS: Cecil R. Hedger, H-e-d-g-e-r.

THE COURT: Mr. Hedger, I'm just going to allow you to testify in narrative fashion as though you were asking yourself questions. I don't see any other way to proceed.

THE WITNESS: Your Honor, Exhibit--Defendants's Exhibit A is a photocopy of a computer run maintained by the accounting department of Harding and Ogborn for the Louisiana-Pacific Corporation engagement entitled Geana J. Dunkin versus Louisiana-Pacific Corporation. It reflects daily time entries by not only myself with the initials CRH, but also other professional timekeepers within Harding and Ogborn performing services and recording time to the engagement Geana Dunkin versus Louisiana-Pacific Corporation.

It is a photocopy, Your Honor, of the time entry commencing on June 17, 1992 with respect to the first--well, the three telephone conferences that I had--Cecil Hedger had with Mr. Smith where we were informed that both Mr. Smith and his client would

refuse to sign the confidentiality--protective order and confidentiality agreement.

Thereafter, it sets forth time entries with respect to myself and other professionals who are recording time to the engagement with respect to communications with clients concerning the situation, research with respect to being able to establish the necessity and the appropriateness of the protective order.

My testimony with respect to Exhibit A, Your Honor, is equally applicable to Exhibit B, Exhibit B being the computer--a photocopy of the computer entries of time from July 1, 1992 on the Geana Dunkin versus Louisiana-Pacific engagement through July the 10th.

THE COURT: All right. Cross-examination on the testimony, Mr. Smith?

CROSS-EXAMINATION

BY MR. SMITH:

Q Mr. Hedger, you mentioned that both of these documents are computer runs; correct?

A That is correct.

Q What relationship do these documents have to your Exhibit A that you have submitted attached to your affidavit that you have filed with the Court in this case?

A May I have a copy of my motion and affidavit?

Q Yes.

THE CLERK: Was it plaintiff's or defendant's?

MR. SMITH: Plaintiff's.

THE COURT: Well, the motion and the affidavit are in the file.

Q (by Mr. Smith) I've handed you, Mr. Hedger, a copy of defendant's motion for approval of attorney's fees with affidavit, and attached to that, as indicated, is your affidavit and attached to that affidavit is Exhibit A. And as the Court has just stated, those are already in the file. A Now I recall your question. Thank you for the courtesy of sharing a copy of the exhibit to my affidavit, Mr. Smith.

If I could draw your attention to Exhibit A of my affidavit, on June 17, 1992, for example, there is a reference of my services with respect to the motion for protective order that was filed I believe on the 19th of June, and two hours are listed on my Exhibit A with respect to that motion.

However, if you look at Defendant's Exhibit A on June 17th, 1992, you'll see that during the course of June 17th, 1992, I recorded nine hours to the Louisiana-Pacific engagement. Not all of the time with respect to that nine hours was spent concerning the preparation, research, conferences and stuff with the--the preparation of that motion for protective order. And the entry--

Q Have you not, in fact--

A Excuse me. I wasn't quite finished, Mr. Smith.

Q All right.

A The entry that appears on Exhibit A to my affidavit is basically a dictation--my dictation of my review of my time records, including the information as it appears on Exhibits A and B.

Q What was your understanding, though, of the Court's order with respect to submitting information on your attorney's fee application? Was it your understanding that that information was supposed to have been submitted by July 13th?

A My understanding was the motion was to be submitted on July 13th; that's correct.

Q And would that include all documentary and evidentiary information that you had to support that motion?

A No.

Q Why not?

THE COURT: Because that's not what the Court requires. Move on.

Q (by Mr. Smith) You have referred in your--either in your motion or your affidavit to this Exhibit A as being a billing statement. Is Exhibit A a billing statement?

A A billing statement in the sense that that's how the--

Q No, I mean a billing statement in the sense of what you send to your clients as a bill.

A No, it's not a billing statement in that sense, no. It's a billing statement for my time for purposes of my motion.

Q Nor is it a contemporaneous record, is it, Mr. Hedger?

A It most certainly is, Mr. Smith.

Q You mean you prepared these entries at the same time that you did the work?

A On counsel table is my calendar book for 1992.

Q Well, I'm sorry, Mr. Hedger, I'm not--

A I fill out time tickets longhand every time I get a phone call and whenever I perform work, and I keep track of it almost simultaneous or immediately thereafter. In fact, when I'm done with this hearing today, I'll go back and fill out a time ticket. I do not and I cannot effectively

practice law if I don't record and describe what's going on at the time that the services are performed for the client. It's not fair to me or my partners and it's not fair to the client.

MR. SMITH: I move to strike, Your Honor; unresponsive.

THE COURT: Denied.

Q (by Mr. Smith) When was Exhibit A to your affidavit prepared?

A On the 13th of June.

Q June?

A Excuse me, 13th of July, I misspoke, 1992.

Q Who prepared the affidavit? I mean, who prepared the Exhibit A?

A I dictated it and my secretary typed it.

Q So you're saying that this--

THE COURT: Mr. Smith, you have a way of prolonging everything about twice as long as it needs to be prolonged. It is crystal clear to me that Mr. Hedger records his time contemporaneously and that he produced Exhibit A on July 13th for the purpose of justifying a figure of some $4,060.00 in attorney's fees, and that he extracted from all of his contemporaneous time records a summary of his own time, put that in Exhibit A and gave that to the Court.

Now, is there something that's unclear about that to you that requires this tortuous cross-examination?

MR. SMITH: Yes, Your Honor.

THE COURT: What is unclear?

MR. SMITH: Your Honor, it's my job at this point to make a record as to whether this was a contemporaneous, meticulous time record for purposes of the Supreme Court cases and the Tenth Circuit case and Rule 105 of the local rules.

THE COURT: Well, he's told you--

MR. SMITH: It is clear to me that not only is this not a contemporaneous time record; this does not tell you anything about the time that was allotted to the specific task performed. And now Mr. Hedger is trying to come in after the fact and cover up the fact that he did not provide this information originally by just saying I have records somewhere that will show this, but he has not presented those to me or to the Court.

THE COURT: Well, he has done so right now with Exhibit A and Exhibit B, as far as I'm concerned.

MR. SMITH: Well--

THE COURT: Are they--is there a motion to admit Exhibit A and Exhibit B?

MR. HEDGER: Yes, Your Honor.

THE COURT: Exhibit A and Exhibit B are received. Those are made from contemporaneous time records. He doesn't have to produce his rough notes. He just doesn't have to do that. I can't think of any court that requires that. All the Court requires is that he keep contemporaneous time records so that we're not in the position years later of going back and reconstructing--attempting to reconstruct time records. That's all that's required. He doesn't have to produce in his original fee application the scraps of paper that he keeps in his pocket.

(Defendant's Exhibits A and B were received in evidence.)

MR. SMITH: May I continue?

THE COURT: Only if you have something that's going to add. I'm not going to permit you to just waste all our time, Mr. Smith.

MR. SMITH: Well--

THE COURT: If you have a line of inquiry that you wish to pursue, I'll permit you to do it. But I'm not going to permit you to go on forever beating this horse to death.

Q (by Mr. Smith) One of the entries made in Exhibit A to your affidavit, Mr. Hedger, the first one is, on June 17th, 1992, you say three separate telephone conferences with David L. Smith re. discovery, and then at the bottom of that sentence, as well as a group of

additional sentences, you give a figure 2.0 hours. How much of that 2.0 hours was spent with three separate telephone conferences with David L. Smith re. discovery and what relevance does that have to these motions for protective order?

A Which question do you want me to answer first?

Q Both.

A Which one first?

Q Either order is fine.

A Approximately, David, an hour and three-tenths, as I recall the length of our telephone conferences, and the relevance of course to the protective order is your flippant remark to me that your client was more interested--her interests go way beyond any monetary recovery in this lawsuit. Your flippant remark to me about your First Amendment rights would be impacted if you signed a confidentiality agreement, and then finally your simple no, we're not going to do it because if we do it, we'll just be doing what you want us to do; that's what the relevance to that time entry is, Mr. Smith.

Q Well, you say that 1.3 of the total of two hours is what those three telephone conferences were composed of; correct?

A That's correct.

Q And you remember this from your memory; correct? 1.3 hours?

A I remember it from--with respect to looking at my original handwritten notes with respect to what was going on that day with Louisiana-Pacific, Mr. Smith.

Q Of what significance was it that plaintiff nor plaintiff's counsel would agree to sign the confidentiality agreement, as far as the protective order is concerned?

A Of what significance is it?

Q Yes, to the protective order--to the motion for protective order.

A I don't understand your question.

Q Was that significant to your deciding to file the motion for protective order?

A That's what prompted it, Mr. Smith.

Q Why did that prompt it?

A It was obvious to not only myself, but also to Mr. Star Kelso, who was present with me when we had those telephone conferences, that you and your client were going to take the information that was going to be provided to you and go public with it.

Q What words were used to that effect?

A "My client's interests go far beyond any monetary recovery in this litigation."

Q Is that an exact quote?

A Yes, it is, David.

Q And you are not presenting your handwritten notes as a part of your submission in this case; is that correct?

A That's correct.

Q And the reason for that is you're claiming privilege?

A Well, not only with respect to Louisiana-Pacific, Mr. Smith, but my time records have information with respect to the entirety of how I spent my time, including other clients.

Q Do you believe that spending 23.2 hours on this motion for protective order was justified?

A More than justified, David.

Q By what?

A If you would have at any time the simple common courtesy to return phone calls and communicate, I wouldn't have had to file some of these protective orders. I am not--

Q Mr. Hedger, isn't it true that I have spoken with you for hours about the discovery in this case? Isn't it true that my client and I begged you for two hours on her deposition to turn over the information

you were supposed to turn over in this case, and you had a deaf ear to this; isn't that correct?

A No.

Q That isn't correct?

A No, it's not.

THE COURT: All right, I said I'd permit cross-examination on the authentication of the documents, which is the only direct. If you wish to call him, you may do so, and then of course he may call you, if you all want to play at that game. I'm going to permit the cross-examination, though, only in the area that he took the stand for.

All right, anything further, Mr. Hedger, that you want to bring up?

MR. SMITH: I would, since this was on the authenticity objection only, I would continue with the objection that this has not been properly authenticated because he has not, you know, tied the computer run-out to his contemporary records that he admits that he has. I don't know why he doesn't introduce them.

THE COURT: Do you know what authenticity is?

MR. SMITH: Yes, I do.

THE COURT: Tell me what authenticity is.

MR. SMITH: That an item is what it purports to be.

THE COURT: Right. Now, why isn't this authentic?

MR. SMITH: This is just someone's typed out reports from another document.

THE COURT: That's what he said. He said this is the billing statement that reflects what he types--or what he writes down, is then transferred to this billing statement. At least that's what I inferred.

MR. SMITH: If this is not being admitted for the truth of the matter, then I have no objection.

THE COURT: No, it is being admitted for the truth of the matter.

MR. SMITH: Well, I say it's not authentic for the truth of the matter that's being shown on--in the typed document.

THE COURT: Now, wait a minute. Wait a minute. You've introduced a new concept into authenticity there, Mr. Smith. You defined it correctly, I thought, as a finding that the document is what it purports to be, and now you're introducing a concept called the truth of the matter. Where did that come from?

MR. SMITH: Well, I suppose technically that would be an additional hearsay objection. But I think it can all be placed under--

THE COURT: So do you have a hearsay objection also?

MR. SMITH: Excuse me?

THE COURT: Do you have a hearsay objection?

MR. SMITH: Well, obviously we're getting transfers of information from notes to computers--

THE COURT: No, no, just answer my question. I'm sorry to interrupt, but do you have a hearsay objection to this?

MR. SMITH: Yes, I do.

THE COURT: All right. In light of that objection, I'll allow you to lay a hearsay foundation if you'd like, Mr. Hedger.

MR. HEDGER: Your Honor, in the normal day to day regular course of business of Harding and Ogborn, professional timekeepers are, by policy, required to maintain daily time records and to submit those daily time records to staff for purposes of having them prepared into the computer system and then input into the computer system. In fact, if a timekeeper does not do that and that policy is not filed, that timekeeper would have his or her compensation withheld. This information is maintained in the normal and regular course of the business of Harding and Ogborn.

THE COURT: All right. Do you still have an objection, Mr. Smith?

MR. SMITH: Yes, Your Honor.

THE COURT: All right. Objection overruled. The exhibits are received. You may step down.

MR. HEDGER: Thank you, Your Honor.

THE COURT: I take it people are here on the 8 o'clock matters. Do we have the folks here in 91 N 2106? What about 92 N 739, is everybody here? All right, I need to get the files and we'll take that up.

(7:55 a.m. - Whereupon, the hearing was recessed.)

(At 8:35 a.m. on July 16, 1992, with counsel for the parties present, the following proceedings were had:)

THE COURT: All right, the Court calls case Number 92 N 243 again, Dunkin versus Louisiana-Pacific Corporation. I guess I somewhat lost track of where we were, but I believe that you had just completed your testimony, Mr. Hedger?

MR. HEDGER: That is correct, Your Honor.

THE COURT: Do you have any other testimony that you wish to present?

MR. HEDGER: No, Your Honor.

THE COURT: All right. I will hear argument on all of the issues then. I think that of course there's the fee application pending; there's also the motion for reconsideration which essentially raises all of

the matters that have been decided previously. So I will permit the parties closing argument, and I want brief closing argument.

Mr. Hedger?

MR. HEDGER: Your Honor, the defendants felt compelled to file the motions for protective order in light of being told flatly that the--neither the plaintiff nor her counsel would sign the protective order, after being told flatly that signing it now and arguing later with an escape clause in it was not acceptable, that the plaintiff's interests go beyond any monetary recovery.

THE COURT: Let me ask you a few questions by way of interruption there, Mr. Hedger.

MR. HEDGER: Yes, Your Honor.

THE COURT: You--did you ever tender to them--I mean to plaintiff or her attorney--a revised stipulated protective order that allowed either party to come back to court in the event that they thought the protective order were over broad and ask the Court to relieve them with respect to a particular document?

MR. HEDGER: I did not. There is some language in the Exhibit A to the June 19th protective order, Your Honor, that does in effect allow for that.

THE COURT: That's what I thought. And that's what confused me.

MR. HEDGER: Well, during the second telephone conversation I had with Mr. Smith on the 17th of June, that--when he was--he made reference that he might want to file a lawsuit against Louisiana-Pacific again or was concerned about some First Amendment rights is where I called back and suggested again that that language about being relieved, and my time entry I think says agree now, argue later, that was discussed. But there is a provision in Exhibit A to the June 19th motion for protective order that allows for being relieved of the duty of confidentiality.

THE COURT: All right. Now, were the documents going to be produced? What was the relationship between the documents that were the subject of the protective order and the depositions? That is to say were you being requested to bring them to the depositions?

MR. HEDGER: Well, during conversations with Mr. Smith, Mr. Smith made several well articulated representations that it was absolutely necessary for him to look at the documents before the depositions, that it's obvious that if he wasn't going to see the documents before the depositions, that it would be necessary to reschedule at least, Your Honor, in terms of Jim Beldin's deposition.

And he made the representation quite clearly to me that we're going to have a double session deposition. Jim Beldin's out of Hayden Lake, Idaho. That is why the request was made to postpone the deposition until it was convenient with--and after the document request.

THE COURT: All right. How did Mr. Beldin's deposition get scheduled? Go through the sequencing of that for me. I notice it was mentioned in the stipulated scheduling and discovery order as being scheduled for June 23rd. Was there ever a formal notice to take his deposition served?

MR. HEDGER: There was a formal notice to take Louisiana-Pacific Corporation's deposition, and a request for an individual to be identified under 30(b)(6). Jim Beldin was the individual who was identified for that.

THE COURT: All right. That is the notice that was served on May 1st, 1992.

MR. HEDGER: That is correct.

THE COURT: And that notice says that the examinee is going to be examined on all information requested in the request for production of documents and the first interrogatories.

MR. HEDGER: That is correct.

THE COURT: All right. So that was the basis for taking Mr. Beldin's deposition on June 23rd. And by virtue of the notice, were you going to produce documents prior to June 23rd?

MR. HEDGER: Yes, Your Honor. In fact, the documents are in my office as we speak and have been for quite some time. Absolutely; that was our intent and that was why the June 23rd date was selected, because we thought by that time the documents would be inspected, those copies that he wanted would be copied and weld get on with the discovery.

THE COURT: All right.

MR. HEDGER: Now, the second motion, Your Honor, with respect to that issue that was filed concerning the Douglas Eddins deposition was filed simply because I was not able to contact Mr. Smith successfully to talk about a voluntary reschedule, with the understanding again at that time that he had not seen the documents and rather than reschedule and what not that deposition, that's why that motion was filed.

THE COURT: Well, now Mr. Beldin's deposition was to be taken in Denver; right?

MR. HEDGER: That is correct.

THE COURT: And was that voluntary on the defendant's part? You were going to bring him from Idaho to Denver?

MR. HEDGER: Absolutely, Your Honor. Before Mr. Beldin was ever served with a summons and complaint, I informed Mr. Smith that we would make Mr. Beldin available here in Denver at no expense to the plaintiff.

THE COURT: All right. Now, answer one more question while I've got you interrupted. What's the status of the interrogatories? That is unclear to me.

MR. HEDGER: Well, Your Honor, there's a screw-up of sorts on my part. I provided copies of those interrogatories to Mr. Smith on the 19th of June of this year. Jim Beldin of course has been in Hayden Lake. We had this discovery dispute going on. The original answers were mailed up to Hayden Lake. They were mailed back. I received them I think in my office finally, because they were--well, sometime in early July. The minute, Your Honor, that I realized that a motion to compel had been served on my office at 4:30 in the afternoon on Tuesday, I faxed over the signature sheet that Jim Beldin had signed. The answers were not changed in any way to what the answers were that were provided to Mr. Beldin--or excuse me--Mr. Smith on June 19th.

THE COURT: When were the answers originally provided?

MR. HEDGER: I don't know. Some of those employees are employees of Louisiana-Pacific corporation and are out of the State of Colorado, some of them have, Your Honor, I submit absolutely no personal knowledge with respect to providing any information that would conceivably lead to any admissible evidence. They are union representatives of some type with the United Mine Workers of America or the carpenters' union and have never been inside the facilities of Louisiana-Pacific at either Kremmling, Walden or Montrose, Colorado, but they're still listed for purposes of discovery.

THE COURT: Well, let me ask you a question about that list of depositions. The plaintiff contends that all of this was agreed to in May in the scheduling and discovery order. Ordinarily I don't sign scheduling and discovery orders like this one because there's no deposition schedule, and this case is exactly why I don't do it I finally, I guess in a moment of weakness, caved in because it had been so difficult to get any type of scheduling and discovery order in this case, and I went ahead and signed it thinking the parties could work it out. of course they didn't work it out.

But the position that the plaintiff is taking is that you agreed evidently to hold open as much time as needed by virtue of the scheduling and discovery order.

Now, what was your understanding of the agreement?

MR. HEDGER: My understanding of the agreement is two-fold, Your Honor. Number one, that Jim Beldin and Doug Eddins would be behind us on or about July the 6th, and that's why the scheduling order says on or about July the 6th.

There is deposition colloquy during the plaintiff's deposition by and between Mr. Smith and myself concerning the fact that we are going to have to adjust and get together with schedules we may have, and identify other people, and we spelled that out in the scheduling order itself. But we talked about the fact that we're going to identify potentially other individuals who would become--may become deponent witnesses and/or trial witnesses, and that we're going to have to work together concerning that.

It was not my understanding at all that on July the 6th, we were going to start taking depositions and go all day long and start on July the 7th, and it was most certainly not my understanding, Your Honor, that I would not have some kind of reasonable notice as to who's going to be going first in terms of being able to prepare for it.

THE COURT: All right. You may continue.

MR. HEDGER: Your Honor, I have nothing further at this time other than just the final argument that I've attempted to be, with respect to my motion for fees, concise and fair in terms of what I reasonably think plaintiff and her counsel have caused my clients to undergo in terms of lawyer time and expense.

Yesterday, I filed with this Court a further response to the motion for reconsideration and sanctions that has an affidavit of Jim Beldin.

THE COURT: I don't have that yet, by the way. I noticed that Mr. Siebert referred to it and I was trying to follow him in what I had. It may not have made it upstairs, depending on what time it was filed yesterday. Do you have it, Mr. Clerk?

THE CLERK: No, I don't, Your Honor.

THE COURT: All right.

MR. HEDGER: Your Honor--

THE COURT: Do you have an extra copy, Mr. Hedger?

MR. HEDGER: Yes, Your Honor. May I approach?

THE COURT: Yes.

Mr. HEDGER: I'd draw the Court's attention to the 1987 Supreme Court decision in the State of Colorado entitled Bowen versus

District Court, County of Adams, which verbatim, Your Honor, adopted the rationale, a lot of the language of the Supreme Court's decision in Seattle Times versus Reenhart that's been cited about free use dissipates in terms of information that's disclosed during discovery. That Supreme Court case in Colorado has been in effect for eight--excuse me--five or so years.

I draw the Court's attention to the affidavit of Jim Beldin attached to the filing yesterday which spells out the confidential nature and how we treat personnel files and how Geana Joy Dunkin, as personnel manager, is well aware of the fact that personnel files are confidential.

As an exhibit to that affidavit is a copy out of the Louisiana-Pacific's corporate policies book concerning proprietary confidential information that specifies employment plans and personnel files are confidential.

I don't understand plaintiff's argument about the material not being confidential. I think they're specious and not well founded. They're not supported by any citation of legal authority.

I do not understand how the plaintiff with a straight face, or her counsel with a straight face, can file a motion seeking sanctions against me over unspecified questions that I was supposed to

have asked in a deposition over two months ago where I do not recall, Your Honor, any objection whatsoever being made in terms of improper question, abusive type of questions or invasive, humiliating or any other type of question right now, and I can't--it's simply impossible to come forward and respond to this.

My clients and myself have been forced to respond to what I think, and if I can quote Barbara Jordan's comments a few days ago, that is absurd and almost, Your Honor, contemptuous of this Court's order.

On July the 9th, plaintiff's counsel filed a request for discovery, for Court approval of discovery, in effect apparently seeking the magistrate to circumvent this Court's ruling on July the 9th. This Court ordered that the new Rule 30.1(a) would be in place for scheduling depositions, that I would be conferred with, and the magistrate would have to approve it subject to Mr. Smith establishing the need and why some other means less costly could not work. The July 9th filing, Your Honor, does not have any reference at all to the Court's--or the July 10th filing, I'm not sure what date it is, but to this Court's order last week.

We are being forced to continually respond and, again, to absurd and contemptuous type of conduct on the part of the plaintiff and her counsel.

Finally, Your Honor, as I represented to this Court a minute ago, I have not spoken with Mr. Smith since July 17th. At no time prior to his filing his motion to compel with respect to the issue on the interrogatories, and I frankly apologize to the Court and I apologize to Mr. Smith, I spaced it and I was late, but at no time did I get a phone call, a letter, Hedger, where are the answers to interrogatories, I need them.

When I supplied the answers to those interrogatories, Your Honor, I told Mr. Smith in the covering correspondence that answers would be provided to him before any depositions were taken so he would not be prejudiced. I was not contacted in any way, as represented by Mr. Smith in his certificate of compliance, concerning the motion to compel.

For all the foregoing reasons, Your Honor, we respectfully request our fees for last week and our fees for this morning. I'm authorized to inform the Court that during the recess, Mr. Siebert has agreed and I have agreed to 2.5 hours of his time up to--up until

6:00 a.m. this morning and for his time in the courtroom thereafter as a witness, and request fees up to this point.

THE COURT: All right. And what amount of time are you requesting? Just for the time here this morning at 175 an hour?

MR. HEDGER: Yes, Your Honor. I will not concern myself with any preparation time yesterday and what not.

THE COURT: All right. Mr. Smith?

MR. HEDGER: Thank you, Your Honor.

MR. SMITH: Your Honor, my starting place has to be with the motion for reconsideration. Along with that motion, I filed a motion to compel and for sanctions relating to the interrogatories and a certificate of compliance with Local Rule 403(g).

THE COURT: Tell me about the certificate of compliance. Did you talk to Mr. Hedger before you filed that?

MR. SMITH: Your Honor, back before the depositions in this case--

THE COURT: No, no. No, no, no. Not have you ever talked to Mr. Hedger.

MR. SMITH: In answer, yes.

THE COURT: The answer to--

MR. SMITH: Is that the answer you--

THE COURT: Did you talk to Mr. Hedger about the motion to compel prior to filing the motion, that is to say between July 1st of 1992 and today?

MR. SMITH: Between July 1 and--what was the event on July 1? I can't remember, Your Honor.

THE COURT: I picked July 1.

MR. SMITH: Oh, you just picked that? Between July 1 and today, I doubt that we discussed the interrogatories specifically.

THE COURT: Well, then how could you have complied with Rule 403?

MR. SMITH: Because we have discussed this in reference to my filing a motion to compel all the way from the beginning when Mr. Hedger wrote me a letter before my client's deposition saying that the answers to interrogatories would be available to us at that deposition, that all of the documents would be available to us at the deposition. Because, you see, these items don't only go to the discovery that the defendants want to do; the plaintiff would like a little bit of discovery too. We would like to know what position that the defendants take on some of these issues before my client's deposition has to be taken, and before that was done, we had extensive discussions

that the answers to the interrogatories and all of the documents would be turned over to us at that time.

When we got to the deposition, Mr. Hedger promptly reneged and said no, I'm not giving you anything. My client had to take her deposition without any--have her deposition taken without any preparation in terms of knowing what position the defendants were going to take, what the documents were, because she needed to refresh her recollection on some of that information.

THE COURT: Well, when were the documents--

MR. SMITH: Subsequent to that time--

THE COURT: When were the documents served?

MR. SMITH: April 30.

THE COURT: The document request?

MR. SMITH: The request?

THE COURT: The request was served when?

MR. SMITH: April 30.

THE COURT: Well, then it wasn't due till May 30th.

MR. SMITH: It wasn't due except through his representations at that time. And at that time, I advised Mr. Hedger that, okay, since you are reneging on your promises and we came here in good faith relying on your promise, we are going to expect the documentation and

the answers to the interrogatories exactly when they are due. I believe the answers to interrogatories were due June 2nd, the documents were due June 4th. When that did not happen, we again had extensive discussions about it, and he just put me off.

THE COURT: Did you get an unanswered--I'm sorry--an unsigned set of interrogatory answers on June 19th?

MR. SMITH: Did I receive a set--a signed set at that time?

THE COURT: An unsigned set.

MR. SMITH: An unsigned set. I received a document entitled Defendants Answers to Plaintiff's Interrogatories.

THE COURT: Unsigned?

MR. SMITH: Unsigned.

THE COURT: All right. So did you call him up and say I've got the unsigned responses, now when are the signed responses going to come?

MR. SMITH: No, Your Honor, I did not. In his letter, Mr. Hedger said, "I realize these responses are unsigned," saying to me he realized they really were not answers to the interrogatories, that he would send over the answers the following Monday. He did not do that.

THE COURT: So before you filed your motion, did you say, look, I want those by such and such a day, and if you don't give them to me, I'm going to file a motion to compel?

MR. SMITH: Yes, I did say that.

THE COURT: You did say that?

MR. SMITH: Yes.

THE COURT: When did you say that?

MR. SMITH: Back when the deposition was taken. THE COURT: Back when the deposition was taken? MR. SMITH: Yes.

THE COURT: No, no, that doesn't make it. That doesn't make it.

MR. SMITH: Well, Your Honor, the rule says that there has to be conference about the motion to compel. We had plenty of conferences.

THE COURT: It doesn't mean you can mention it way back here and then come to court when you could have solved the problem by saying, look, I'm going to go to court if I don't get a signed copy.

MR. SMITH: Your Honor, this trick is played by every defense counsel in every one of these cases that I have ever been involved in, and what it comes down to is they play the game of pushing it out further into the future so that you never get your answers.

THE COURT: Well, you've got answers--

MR. SMITH: And you have to eventually file a motion to compel, and then when you file a motion to compel, they say, oh, excuse me, I forgot about that, and send it in and moot it out. This is a trick that is played over and over and over, and this is what Mr. Hedger was doing here also. And there's no doubt about it. Yes, I did confer with Mr. Hedger over and over about the interrogatories and about the documents before I filed the motion to compel.

Now, I did not, in answer to your question did I confer with him between July 1 and July 17th, probably not, probably not after June 17.

THE COURT: Why not?

MR. SMITH: Why? Mr. Hedger had broken every one of our promises relating to this case. He had promised--

THE COURT: Well, you know, for one--for starters--

MR. SMITH: --to turnover the--you asked me.

THE COURT: Mr. Smith, for starters, the local rule of this Court says that the Court is not bound by agreements among counsel concerning discovery. And this situation is exactly why the rule exists.

MR. SMITH: We have an order in effect, Judge.

THE COURT: Is that the private agreements among counsel, I can't enforce because it always comes down to your word against his. And so all I can do is enforce what's in writing and what the Court has previously ordered.

MR. SMITH: And the Court had previously given us a stipulated scheduling and discovery order. And, of course, objectively that is what this is all about. You know, the motion for reconsideration can be broken down I guess substantively into the motions that are directed toward the documents and those that are directed toward the depositions. The interrogatories fall outside of this, and the only issue is the one raised by Mr. Hedger on that as to whether there was conference before the motion was filed. There was conference; not immediately before, however, I admit.

As far as the motion for protective order is concerned, those directed toward the depositions, we have the motions that are directed toward the defendants' depositions and we have the motion--the ones that are directed toward the non-party witness depositions.

It's my understanding that the only thing that this Court has entered those relating to sanctions regarding are the latter, that is, the non-party witnesses. But that does not mean that there's still not substantive issues relating to the depositions going to the defendants.

And with respect to those motions, those going to the defendants, it's clear that we had a stipulated order in effect that the depositions would be taken at a certain time. Yes, deposition notices were also sent out confirming that the depositions would in fact be taken at the time that counsel and the Court had agreed.

And as far as this statement by Mr. Hedger that Mr. Beldin voluntarily agreed to appear, I never noticed Mr. Beldin's deposition. The deposition that was noticed was the deposition of Louisiana-Pacific Corporation, and Mr. Hedger said that Mr. Beldin was going to be the company representative. So that's not a voluntary situation. That's a situation where he was required to attend.

I don't know what point he is making by indicating that Mr. Beldin was doing this out of the goodness of his heart or something, but it was a situation where a deposition notice had been sent out and we had an order by the Court that the company's deposition was going to be taken and Mr. Hedger said I am sending Mr. Beldin.

As far as whether the documents had anything to do with whether those depositions would be taken or not, yes, I told Mr. Hedger that I thought the best way to take the depositions of the defendants, just as for him to take the deposition of the plaintiff, was to

have all of the documents produced first. I told him that was the only rational way to approach this. We discussed this when we were before the Court prior to the time that the stipulated order was entered into. But Mr. Hedger refused to turn over the documentation, and he said, "Don't you need an extension of time then to take the depositions?" I said, "No, there is much more that I'm going into with these witnesses other than just introducing the documents into the record."

THE COURT: Well, did you tell him that you would have to split the depositions, that you would take the depositions and then you'd do them again as soon as you--

MR. SMITH: I said that I needed to take the depositions and that there was much more that I needed to go into in those depositions other than introducing the documents, and that it may very well be that if I cannot get all the information, if he does not bring the documents, that I will have to continue the depositions so that we can introduce the documents. I had reminded him that we had a stipulated order in effect and that we had stipulated that these depositions were going to be taken at the time that that said, and he said that didn't make him any difference, that he was not going to go forward with the deposition even though we had agreed to it. That was with respect to the defendants.

With respect to the 30 plus other non-party witnesses, Mr. Hedger also agreed to those depositions exactly in the form that I noticed them. As I have stated in my motion for reconsideration, that was the basis of sending out the notice of depositions, just confirmatory precisely of what we had agreed to in the order. And for Mr. Hedger to stand up here and say that he is surprised that we were having those depositions is ridiculous.

We did only agree on a date to commence those depositions, and we agreed on a time at 9 o'clock in the morning. Yes, we agreed that there was to be flexibility in the scheduling after that. Nothing in the deposition notice indicates otherwise. The deposition notice says that those depositions will be taken during reasonable times after they are commenced on July 6th. This wording is exactly the wording that was in the order.

How we can now have an order saying that it was proper for Mr. Hedger to submit motions for protective orders going to depositions that he himself agreed to is beyond me. What, on the technicality that a deposition notice is not supposed to be sent out without conferring with opposing counsel? Well, in the first place, as we discussed last time, that is not even the rule for this case. We're still operating under the old rules. There's no actual legal requirement

under the rules of procedure that a deposition notice be discussed with opposing counsel before a deposition notice is sent out.

So it is beyond me what we are arguing about here. the motion for protective orders with respect to all of those depositions appear to me to be totally bogus. We were only doing what the scheduling order required us to do.

THE COURT: Let me interrupt you there.

MR. SMITH: Yes.

THE COURT: This is just really more than I can take. In Paragraph 4 of ii of the scheduling and discovery order, you indicate an intent to take "all employees who applied for or received disability wages at any time during the period January 1, 1988 to the present." And in the next paragraph, you announce an intent to take all persons who participated in the decision to discontinue plaintiff's disability wages on or about April 1, 1992.

Now, what did you think you were going to do? Were you just going to plow through these, and how were you going to know those people?

MR. SMITH: Your Honor, if you will check, those would have been in the answers to the interrogatories had Mr. Hedger supplied those. And it should be noted that Mr. Hedger agreed to this also. We

agreed we didn't know the names of all of the people. I assumed that he had not sat down and done a detailed enough interview with his client to know who all of these people were. We were remaining flexible, but that was a category of depositions that we needed to take because that is absolutely critical to my case. I have no other way to get that information except from the defendants.

Now, Mr. Hedger won't answer my interrogatories, he won't give me the documents, he filed motions for protective orders for the defendants' depositions. Well, let's try the non-party witnesses. Well, he doesn't want me to depose them either. Now, what discovery is it that I'm allowed to do in this case, by the way?

THE COURT: I'll tell you in a few minutes.

MR. SMITH: Well, I'm talking from Mr. Hedger's standpoint. I mean, he has filed motions--he has completely stopped my discovery on this--in this case based on what, that I didn't confer with him for--before I noticed a deposition that we had already agreed to? How ridiculous.

THE COURT: Sir, he didn't stop your discovery.

MR. SMITH: He has stopped my discovery, Judge.

THE COURT: He indicated that all of the documents, every one of those documents would be produced subject to a confidentiality order.

MR. SMITH: I am not required to sign a confidentiality order when there is not confidential information involved. And when the expert witness testified today, he didn't give any citations to authority showing that any documents that Mr. Hedger was asking for were confidential. Mr. Hedger has not cited any authority. He has not--

THE COURT: Well, he certainly has.

MR. SMITH: --presented any documents to the Court.

THE COURT: He certainly has.

MR. SMITH: What authority?

THE COURT: Do you read what he submits?

MR. SMITH: You mean Seattle Times versus--

THE COURT: He submitted authorities in his papers.

Mr. SMITH: Your Honor, that issue cannot be determined without seeing the documents that Mr. Hedger is claiming are confidential. Not everything in a personnel file or in a medical record can be claimed to be confidential.

THE COURT: so is it your position that I'm going to have to go through document by document every personnel file?

MR. SMITH: No, Your Honor. My position is that any document that Mr. Hedger thinks is confidential should be submitted to someone. I don't think that all those documents are confidential. The number of documents that would be confidential in that documentation, as I told you last time, 99.99 per cent of it would not be confidential. I know Mr. Hedger in the latest submission--

THE COURT: Have you got any basis for that statement?

MR. SMITH: No, I don't because I don't have the documents either. That was Mr. Hedger's burden. That's what he takes on when he files a motion for a protective order, to provide the Court with the information to make the decision. He has not done that. That's why I said last time I had no idea whether there is confidential information in those files or not. I don't. How would I know? These are categories of documents. I don't know. But we get a blanket order in this case, Judge, that just says everything is confidential. That can I t be.

THE COURT: Well, it didn't quite do that, did it?

MR. SMITH: Well, I'm not sure.

THE COURT: Did you read the order? Did you read the order?

MR. SMITH: You mean the one that Mr. Hedger wanted me to sign?

THE COURT: Yes. Did you read it?

MR. SMITH: Yes, I did.

THE COURT: Well, what do you make of this paragraph of the order. "If and to the extent the plaintiff believes that any documents have been improperly labeled as confidential and wishes to disclose such documents outside the terms of this order, the plaintiff shall provide the defendants with reasonable notice of her intent to disclose the documents. If the parties cannot resolve their disagreement with respect to the disclosure of any document designated as confidential or the propriety of such designation of any document, the parties shall jointly petition the Court for a determination of these issues."

Now, why wouldn't that have allowed you to go ahead with your discovery, and if you thought that there had been too broad a designation, you could come to the Court at that point and say this document is not confidential, this one isn't, this is?

MR. SMITH: Your Honor, that places on the plaintiff a burden that I don't think goes on the person who is asking for the documentation. He is saying everything is confidential. It's his burden to show a Court that that documentation is confidential. With these broad kind of confidentiality orders--

THE COURT: What do you want to do with these documents?

MR. SMITH: Excuse me?

THE COURT: What do you want to do with these documents?

MR. SMITH: We're going to use them for discovery in the case. But what I don't want is--

THE COURT: Well, let me--

MR. SMITH: --two years from now when I sue Louisiana-Pacific corporation again, if that happens, I don't want to be worried that some language in a confidentiality order two years ago prevents me from doing something I need to do in the present case. I already have that situation right now. I'm not signing off on confidentiality documents unless I know there is confidential information in those documents.

THE COURT: Well, I'll enter an order that you don't have to sign off--

MR. SMITH: Well, if I'm ordered to do it, I will do whatever I have to do. But I'm saying I'm not voluntarily signing those documents.

THE COURT: All right.

MR. SMITH: Without me even knowing what the documents are? How--why would I? Sometime two years from now, Mr. Hedger might pull out a document and say, oh, we thought this document was

confidential, now pay the liquidated damages provisions in the confidentiality order. I've got one of those right now--

THE COURT: There's no liquidated--

MR. SMITH: --that I have to debate as to whether--

THE COURT: Sir--

MR. SMITH: Excuse me?

THE COURT: Sir, there is no liquidated damages provision in this--

MR. SMITH: Well, there is in another one.

THE COURT: Well, we're talking about this one.

MR. SMITH: Judge--

THE COURT: There is no liquidated damages provision in this confidentiality order.

MR. SMITH: This does--

THE COURT: Now, deal with this one, sir.

MR. SMITH: All right. This stifles my freedom of speech and my client's also. We don't know what documents are being ordered not to discuss based on that confidentiality order, and it places upon us a burdensome procedure to get that determined, and I don't think that we want to take on that burdensome procedure. If Mr. Hedger thinks that he has confidential documents, he should turn them over to the Court

and let the Court make that determination. And that's the second group of--or some of the motions for protective orders, at least two of them, go to the documents. But there hasn't been any good cause, i.e. there has not been any proof that there is any confidential information involved.

THE COURT: You know, one of the things you asked for is medical records of other employees.

MR. SMITH: Yes.

THE COURT: Do you think there might be some confidentiality involved there?

MR. SMITH: There's--it's possible that there might be. I'm not sure of what--

THE COURT: Is it more than possible? I mean, don't--

MR. SMITH: No, not really.

THE COURT: --employees have an expectation of privacy in their medical records?

MR. SMITH: No, the case that we've been talking about, the Reenhart case, does not give any definition of confidential information. It just says if there is confidential information, the party does not have the right to turn it over outside of a legal proceeding.

THE COURT: All right, have a seat. I've got a question from a jury.

MR. HEDGER: Do you want counsel to--

THE COURT: Well, you'd better have a seat in the back row so the jury doesn't wonder what's going on.

(9:15 a.m. - Whereupon, the hearing was recessed.)

(At 9:18 a.m. on July 16, 1992, with counsel for the parties present, the following proceedings were had:)

THE COURT: Case 92 N 243, Dunkin versus Louisiana-Pacific. All right, Mr. Smith?

MR. SMITH: So based on the lack of good cause, I don't believe there was any basis for filing a motion for protective orders. So that gets me I guess to the motion for--I mean, the order for sanctions.

As I understand it, the Court only granted the order for sanctions relating to the deposition notice for the 30-odd witnesses.

THE COURT: No, that's not true. That's not true. That's not true.

MR. SMITH: Well, that was my understanding--

THE COURT: We discussed the confidentiality order, we discussed issues of confidentiality last Thursday. I told you what my understanding of confidentiality was, and I did not expect that when you

walked out of this courtroom last Thursday, you would go compose a document request and a set of deposition requests to the magistrate that would ask him to do what I'd already told you you could not do.

MR. SMITH: Judge, my understanding of that order, and as you know there is no written order, or none that I'm aware of, none that I have received, my understanding of the order was that for my client to get any discovery in this case, that the requests for discovery had to be submitted to a United States Magistrate.

Now, how am I supposed to do that except making a motion for the magistrate to please approve these requests? That's exactly what I did.

THE COURT: I had already told you, sir, that the document requests were not going to be granted unless some kind of protective order were entered. And I thought I clearly indicated to you that you ought to be conferring with Mr. Hedger regarding the scope of a confidentiality order.

MR. SMITH: Your Honor, I thought that the Court had already ordered a protective order be entered.

THE COURT: Well, no protective order has been entered.

MR. SMITH: Well, Your Honor, I don't--

THE COURT: Then why are you going to the magistrate and asking for the very documents that I said you could only get before--under a protective order?

MR. SMITH: Well, both counsel are confused on that issue then because I know that both of us have made representations in pleadings that we understood that your order was that the protective orders that Mr. Hedger has asked for, whatever that is, are granted and that in order for plaintiff's counsel, but not defendants' counsel apparently, to get any discovery in this case, that those discovery requests would have to go through a magistrate. And the intent of my motion was to do exactly like that. I believe it's a completely burdensome procedure, Your Honor. Every time I want to take a deposition, I have to make a motion to the magistrate? I don't see how that is--

THE COURT: Well, you brought it on yourself.

MR. SMITH: Well, that's what I'm discussing with you now, Judge. I don't see the basis for the motions for protective order. And so that gets to the motion for sanctions. All that I could understand from your verbal order the other day regarding the motion for sanctions was that you were saying that I should have conferred with opposing counsel

before noticing depositions that had already been stipulated to, and we had discussed that that local rule was not even in effect in this case.

But if that's the case, why did I have to discuss anything? I did. I discussed it before we did the stipulated order. It took us a long time. I can show you the drafts of the order that went back and forth and back and forth and back and forth before we came to this understanding that we would take all of these people's depositions. so we discussed this extensively. I did comply with even the new rule. But to impose sanctions because I didn't comply with a rule that was not in existence at that time, I just did not understand that and I did not understand why I had to go through a magistrate, and that ruling seemed to be based on the same type reasoning, that I did not confer.

Judge, I have conferred with Mr. Hedger more than you would believe. Mr. Hedger is working on an hourly rate. If he confers, he charges his client. I can't confer all the time that Mr. Hedger wants to confer. If I did that, I would do nothing but confer with Mr. Hedger. We have these things worked out in a stipulated order. I don't know why we couldn't follow it. That's what I was trying to do.

THE COURT: All right, are you done?

MR. SMITH: I think I have made the technical points that I want to make on the request for attorney's fees. obviously they are not

contemporaneous records. I don't believe that it has been shown that 23.2 hours should have been spent on these motions, especially when they were questionable to have filed in the first place.

I must admit that I have been caught by surprise on this. My understanding of the Court's July 9th order was that all of Mr. Hedger's evidence was supposed to be in by the 13th so that I would have an opportunity to respond. What we get is a hearing today of an expert witness that I have had no hope of responding to or presenting rebuttal evidence to. I see that Mr. Hedger has--

THE COURT: No, that was what the hearing today was about. You could present rebuttal evidence.

MR. SMITH: Your Honor, all I got from counsel was his own affidavit, and that affidavit, as I have pointed out, is insufficient and I made a response--

THE COURT: You could have presented rebuttal evidence.

MR. SMITH: Excuse me?

THE COURT: You could have presented rebuttal evidence.

MR. SMITH: I presented my rebuttal in my response to his motion.

THE COURT: Well, fine. You don't have any evidence aside from that.

MR. SMITH: Well, I might have had evidence if I'd had an affidavit of an expert that I could have rebutted.

THE COURT: Well, that's the purpose of a hearing. We hold these hearings so that the parties can produce evidence.

MR. SMITH: Well, I was under the impression that what--that the hearing was going to be limited to what Mr. Hedger presented originally and what I responded to.

THE COURT: All right. Anything further?

MR. SMITH: And I would say on that point that the affidavit that he has submitted is obviously meant to cover his tracks on the good cause question. I would move to strike that affidavit because it was submitted late and I don't think that it goes to facts and certainly doesn't show that there was confidential information.

THE COURT: Now, wait a minute. The affidavit was submitted late?

MR. SMITH: Was submitted yesterday. There is a rule in your order--

THE COURT: Now, wait a minute. Which affidavit are you talking about? The affidavit of Cecil R. Hedger filed July 13th?

MR. SMITH: No, the affidavit of James Beldin. Mr. Hedger did submit his affidavit in compliance with your order, although I did

not receive it, it was not hand delivered to my office until the 14th of July. I assume that he filed it here on the 13th. But on the 15th, he filed another affidavit, that is the affidavit of James Beldin, going to--it appears that he's worried that he hasn't shown good cause, and he's trying to use that affidavit to in some way bolster the case that the documents he asked for are in fact confidential information. And as I said, I didn't get this until yesterday. I consider that to be late. I don't consider that to be actual factual information that this is confidential information.

THE COURT: Anything further, Mr. Hedger?

MR. HEDGER: No, Your Honor.

THE COURT: All right, I am going to make some findings here concerning the background of this case and what leads us to this stage in the litigation, and I am imposing sanctions, I am going to grant the award of fees and I'm going to grant them against counsel personally.

The complaint in this case was filed on February 7th, 1992. The case immediately--almost immediately began to create management headaches for this Court because of plaintiff's counsel's behavior.

On April 14th, 1992, in a routine check of the file, my staff discovered that some of the defendants had not been served. I, therefore, issued a routine order to show cause why the complaint against James Beldin and Dan Dilworth should not be dismissed for failure to prosecute.

Instead of promptly serving Mr. Beldin and Mr. Dilworth, the plaintiff's counsel responded with a verified response to the order to show cause on April 21st that says, number one, we've been trying to serve Mr. Dilworth and Mr. Beldin, but we haven't been able to serve them, and so we request four additional months beyond the 120 days permitted by Rule 4(j), meaning that the plaintiff was requesting until August 21st, 1992 to serve process on these additional defendants.

As I later found, the plaintiff did not explain what efforts she was making to serve Mr. Beldin. She did not explain what efforts she was making to serve Mr. Dilworth. She did not indicate that they were avoiding service, either one of them. She did not indicate anything that would indicate to the Court that she was diligently pursuing the case. And, indeed, she proposed to extend the time within which she could make service until a date far beyond the date that had already been set for several conferences by this Court.

Upon consideration of that response, I entered an order requiring that the plaintiff proceed and finding that her request for an additional 120 days beyond the time already permitted by Rule 4(j) is wholly unsupported by the required showing of good cause. And I, therefore, ordered her to serve James Beldin and Dan Dilworth and file written proof of service with this Court no later than Tuesday, May 26, 1992.

Thereafter, I understand Mr. Hedger agreed to accept service on behalf of Mr. Beldin. Mr. Dilworth was never served, and I later dismissed the case against Mr. Dilworth. Now, that's where matters stood as of about eh end of April, 1992, and I had already spent a significant amount of my time and a significant amount of staff time on this case because of plaintiff's counsel's incomprehensible refusal to proceed forthwith with the case and to get the defendants served.

Mr. Beldin answered, the scheduling and discovery order was entered, and I might add that that was a headache also, an unusual headache in this case because the discovery and scheduling conference was originally scheduled for May 6th. Under the hearing, conference and trial procedures that I follow, the proposed order was due for my review the week before, which would have been roughly April 27th, 1992. No order was submitted.

On May 4th, I finally got an order from Mr. Hedger under cover of a letter dated May 4th that recites Mr. Smith's intents and vigorous objection to Louisiana-Pacific Corporation's and Douglas Eddins' notice of plaintiff's deposition to commence on May 14th, 1992.

That matter was taken up at the discovery and scheduling conference. Mr. Smith took the position that there was some kind of custom that permitted him to put off the plaintiff's deposition until after certain defense depositions had been taken. I ordered at the discovery scheduling conference that plaintiff and counsel, having been properly noticed to appear for a deposition, would appear for her deposition as scheduled. And I further ordered that documents are to be produced and deadlines are to be set in accordance with the rules, and I ordered that counsel submit or file a joint status report by May 18th on possible settlement talks with the magistrate.

In addition, I ordered that the parties file a new stipulated scheduling and discovery order by May 12th, because what they had submitted then was, under cover of the letter of May 4th, was totally inadequate. Indeed, it was only Louisiana-Pacific Corporation's and Douglas Eddins' proposed scheduling and discovery order, and it contained absolutely no input from the plaintiff, even though, as

Mr. Hedger recites in his letter, which has not been disputed by the plaintiff, input was sought from the plaintiff.

Finally, on May 28th, 1992, I received the stipulated scheduling and discovery order. And I might mention that in between those two times, there was a stipulation submitted on May 22nd, 1992 concerning progress on the order which recited that counsel had been diligently communicating and negotiating a schedule of discovery in this matter involving at this point in excess of 37 identified individuals, et cetera, and it also recites that plaintiff's initial deposition had been taken commencing on May 14th, 1992 and it recites that it would not be appropriate to have the matter referred to a magistrate prior to the status conference.

Now, when I received the stipulated scheduling and discovery order on May 28th, I immediately noticed that it did not comply with what I require of stipulated scheduling and discovery orders, and that is that the parties agree among themselves and among counsel and with the deponents on a definite schedule and date for each deposition.

What the stipulated scheduling and discovery order here did was to say that commencing on about July 6th at 9 o'clock a.m., the following individuals will be deposed, and there are listed some 37 or

38 people. Not all of them are listed by name. Some of them are listed by general category.

At that point, I seriously thought of having counsel in again to start over, and I did not do so primarily because I had already spent more time on this case than on any other routine Title 7 case that I can think of at this point in the litigation. And on the representation that counsel had stipulated to this order, I went ahead and signed the order.

Now, when I signed the order, I did not interpret that order, nor can the order reasonably be interpreted to provide that 37 depositions were going to begin on July 6th, 1992 at 9 o'clock a.m. and continue each and every day until all 37 of those depositions were concluded. And that is what counsel later noticed in the deposition notice and then justifies his position by say well, that was all agreed to in the stipulated scheduling and discovery order.

It is my specific finding that that was not agreed to based on not only Mr. Hedger's representation that that was not agreed to, but my interpretation of the scheduling and discovery order. That does not permit counsel, without further notice, without consultation, without so much as a "by or by" to send out a notice of depositions on

June 30th for depositions to commence on July 1st--or on July 6th, 1992.

After the stipulated scheduling and discovery order, there were some depositions that were set to commence on June 23rd, as I understand it, and at that point, there arose a controversy concerning confidential information.

The notice of deposition that had been sent out on May 1st for Mr. Eddins and for a representative of Louisiana-Pacific Company indicated that inquiry would be held or conducted on all of the information requested in plaintiff's first request for production of documents and all information requested in plaintiff's first interrogatories.

It appears, and I find, based on the representations of both counsel that Mr. Smith understandably wanted to have the documents before the deposition of Mr. Beldin went forward on June 23rd. And I further find that he told Mr. Hedger that if the documents were not presented on June 23rd, that it would be necessary to split the deposition so that the deposition could not be concluded on June 23rd or shortly thereafter. And I further find that Mr. Smith was taking the position at that time that he would not agree to or sign or

consider or negotiate on any kind of a protective order because he took the position that no document that was being requested was confidential.

With respect to the documents that are being requested, I'm going to make some findings. The documents requested are broadly categorized, and it may well be that there are certain selected documents among the documents requested that would not ultimately be determined to be confidential. However, it is also my clear finding that the vast bulk of these documents are proprietary, confidential information.

I make that finding for several reasons. First of all, on a review of the documents, the review of the documents includes personnel files, it includes workmen's compensation files of other employees, it concerns--it requests Colorado Civil Rights Commission files on all complaints, it requests medical records of certain other employees, it requests Equal Opportunity--United States Equal Employment Opportunity Commission files in the possession of the defendant.

Medical records, contrary to what Mr. Smith says, are inherently confidential, particularly medical records of other employees. I don't have to go through each medical file to make a determination that medical records as a broad category are likely to be confidential information. Indeed, it is somewhat surprising to me that Louisiana-

Pacific is willing, without some sort of specific medical waiver by the affected employee, to produce the medical records of the other--of the employee under a confidentiality agreement. However, they are, and so I don't pass on that. Those medical records are undoubtedly confidential, and I don't need to look at them to make that determination.

Personnel files. It is true that there may be documents in personnel files that are not confidential. However, the vast bulk of personnel files, evaluations, criticisms, are regarded by employees as confidential information. They expect a certain level of privacy when they are frankly discussing their job and having their job discussed by their employer. There's no question in my mind that the bulk of personnel files requested are confidential, and I don't need to look at the personnel files to make that determination.

If there's any doubt about the finding of confidentiality, that doubt--or the fact that they're proprietary information--that doubt is resolved by Mr. Beldin's affidavit which has been submitted as Exhibit A to defendant's response to plaintiff's motion for reconsideration and motion to compel.

Now, as I say, it's possible that there are documents requested that are not properly regarded as confidential, and the

question is what should happen in that situation. It seems to me there are two alternatives. Number one, the parties can complain about it and fight about it and argue about it and present the issue to the Court, and the Court can go through a stack of documents and sort them through as this one's confidential and that one's not confidential, and this one is confidential and that one is not confidential, and so forth. If I had to do that in every litigation, I would do nothing but resolve discovery disputes. I wouldn't have time to do everything else.

In my experience, the way--both as a lawyer and as a judge, the way that these issues are resolved is that the parties sit down and negotiate some sort of confidentiality agreement as a means of convenience, as a means of expediency.

Now, that doesn't mean that the plaintiff or the defendant is agreeing that every document that's being produced is confidential. What it means is that the parties are agreeing, for the sake of producing the documents, to abide by a confidentiality order, and that is exactly the kind of confidentiality order that was being proposed here. And Mr. Hedger made it very clear that it was at all times negotiable, the plaintiff could look at it. If there were any changes that the plaintiff wanted to negotiate, it was possible to negotiate those changes.

And most importantly, the confidentiality order here, like many confidentiality orders that I've seen, has a mechanism by which the parties can seek further review. And that mechanism is that if there's any party who feels that a document is not confidential, that party can apply to the Court, present the document and ask the Court for a determination concerning the confidentiality of that document.

Now, that kind of procedure seems particularly appropriate to me here where the categories of documents requested are broad, they include documents that are, on their face, confidential and they may include--they may or may not include some documents that may ultimately not be determined to be confidential. But the orderly procedural way to straighten that out is, certainly in a case where the vast majority of documents on their face are confidential, is for the parties to negotiate, if possible, a confidentiality agreement that protects the interests of both parties and allows the plaintiff to get on with the litigation and allows the defendant to protect its proprietary and confidential information.

In that manner, if there are documents, for example in the personnel file, that are not properly regarded as confidential, the plaintiff, if she perceives herself prejudiced by the confidentiality order, can apply to the Court for relief from the confidentiality order.

Now, what concerns me very much here is the suggestion that's made by the defendant, and really not sufficiently rebutted by the plaintiff, that she's not really interested in the documents for the purposes of this lawsuit. She's interested--and I'm paraphrasing what Mr. Hedger quoted exactly--she's interested in the documents for purposes beyond this lawsuit.

Louisiana-Pacific, reasonably I think, inferred that that was a threat to go public with some of these documents that Louisiana-Pacific regards as confidential or proprietary, or at least to circulate them to other parties. And it's a small wonder at that point that Louisiana-Pacific decided that a confidentiality order ought to be required or in place.

So for those reasons, I find that the--I will make a finding that the vast majority of documents that are requested by virtue of plaintiff's document request are documents that are confidential and/or propriety in nature and, therefore, Louisiana-Pacific acted properly in asking for a confidentiality order.

Now, technically, it seems to me, that Louisiana-Pacific did not go about it in exactly the rule book sort of way. The proper procedure when responding to a document request that requests privileged information or confidential information or propriety

information is to object to the document request and apply for a protective order under Rule 26(c). Louisiana-Pacific did not do that.

However, I cannot fault Louisiana-Pacific for not doing that because it seems to me it effectively did the same thing in a manner that was designed to minimize the possibility that the Court would need to get involved in this controversy.

What it did, rather than objecting and applying for a confidentiality order, was to indicate in its response that all documents would be produced, and there is not a single objection to the request for production of documents. In spite of the fact that the documents requested are broad, in spite of the fact that they request information at plants other than the Kremmling plant where the plaintiff was employed, all documents were going to be produced.

The only request that Louisiana-Pacific made, or stipulation or condition that it made, was that a confidentiality order be entered. A confidentiality order was attached and it was clearly indicated to Mr. Smith that the terms of the confidentiality order were negotiable. Mr. Smith refused to negotiate. He refused to do anything whatsoever.

Instead, what he said was, well, if I don't get those documents by the deposition of June 23rd, I'm going to have to take

Mr. Beldin's deposition not only on June 23rd, but I'm going to have to take it at a future date too. That was what prompted the defendant to file the first motion for a confidentiality order--for a protective order, as I understand it. And that was that the controversy concerning the documents was festering, Mr. Smith was taking the position that he would reserve the right to take a second deposition if the documents weren't produced, he was refusing to sign or negotiate or work on any kind of a confidentiality order, and so that was when the motion for the first protective order was filed.

Based on the findings that I have made here and the findings that I made in the first hearing on July 9th, there is no question in my mind that good cause was shown for that protective order.

The same thing applies with respect to the second protective order, which was the protective order with respect to Mr. Eddins' deposition. Again, Mr. Smith had refused to even consider, negotiate, talk about a confidentiality order on any terms.

I find that his position is essentially frivolous. There is no free speech right to disseminate every document that you get in litigation. I cannot think of a single case that says your right of free speech is infringed because you are subjected to some kind of a confidentiality order in litigation. Otherwise, the resolution might be

that you never got the documents and couldn't speak anyway. Free speech simply has absolutely nothing to do with it, and I find no other right of the plaintiff that's infringed by the imposition of a proper and limited confidentiality order such as that which was proposed here.

That brings me to the final issue in the case, or the final protective order that was sought, and that was the protective order with respect to no fewer than 37 depositions involving some named as well as unnamed deponents. That deposition notice was filed on June 30th, 1992. It is undisputed that plaintiff's counsel did not talk to defendant's counsel about scheduling those depositions.

They did talk about the depositions prior to the stipulated scheduling and discovery order. There's no doubt about that. But that is not the same as sitting down with your opposing counsel and talking about a deposition schedule before you actually notice those depositions. It is not sufficient under the discovery rules or the local rules, the new rules or the old rules, for counsel to willy-nilly notice 37 depositions on five days notice, many of those depositions being deponents or people associated with the defendant, and drop that on counsel five days or six days before 37 depositions are scheduled to commence.

There is no written local rule that says that you have to give counsel notice. I acknowledge that. There is, in my mind, however, no question that that is abusive deposition conduct.

We hear a lot about Rambo litigation and Rambo litigation tactics and harassment, and harassing litigation tactics. If that is not a harassing litigation tactic, I don't know what is. To not talk to your opposing counsel about scheduling, to drop a deposition notice on June 30th that notices 37 depositions, to not tell opposing counsel whose employees or former employees are being deposed what order those depositions are going to go in, and to include in that notice a bunch of people who aren't even identified in the deposition notice, and then to say that those depositions will continue from day to day thereafter until concluded, which could mean God knows when, would you be going in August, would counsel have to reserve all of July, would counsel have to reserve the weekends, nobody knows because Mr. Smith didn't bother to talk to him to figure out exactly what the schedule was. So that's why I granted that motion for a protective order, and that brings me to the issue of sanctions.

Ordinarily deposition and discovery rules are supposed to be self-executing. They can be self-executing by and large only if counsel are cooperative and talk to one another and make themselves

accessible. otherwise, it is a miserable process. It is a miserable process for counsel and it is a miserable process for the Court. And the reason it's a miserable process is because--is illustrated by this hearing. We have now spent almost four hours on this matter.

In that situation where conduct such as this has occurred, I believe that it's justified and justifiable to impose certain limitations on the entire discovery process and to impose those limitations not on both parties alike, but on the party or the attorney who is causing the abuse. And on reviewing the record here, there is no question in my mind, Mr. Smith, that it is your conduct, your obstreperousness and your stubbornness that has caused all of the delay and has caused us to be here for this hearing today. And that was the reason that I imposed the requirement that you clear all future depositions with the magistrate.

Rather than attempting to comply with this Court's order of July 9th, what you did thereafter is almost a flaunting of the order. No sooner had you walked out of this courtroom and I walked off the bench, than I received in chambers a copy of the discovery request for the magistrate which requested not only the litany of the same 37 depositions, including the dead man that you'd already been told was dead, and not only the same request for production of documents, but

also every piece of discovery that you had requested and that I had already told you that you couldn't have.

Now, what I infer from that is that it's difficult for you to learn from what the Court is doing, and so not only am I going to require that you clear the depositions with the magistrate, but I am either going to require that all depositions in this case be taken before a United States Magistrate or that they be taken before a special master. That sanction is expressly permitted by the new local rules, and I told you the last time that we were here that I would apply the new local rules to this case in light of the unusual conduct of counsel in the case.

And what I'm going to do is consult with the magistrate and see if the magistrate has time to do it. If the magistrate doesn't have time to do it, I intend to appoint a special master to preside over every deposition you take. And I do that not only because of your conduct on July 9th, I do it also because I've listened to you this morning and I've listened to you question witnesses. I've listened to you conduct cross-examination, and you can't do it. I think you're just trying to harass everybody here. I think you're trying to harass Louisiana-Pacific, opposing counsel and the Court.

That brings me to the question of fees. Your objections, Mr. Smith, to the fee request and your evidentiary objections are

beneath frivolousness. You have conducted yourself this morning in a way that is obstreperous, obstructionist, non-cooperative, and if every attorney conducted himself in the way that you have conducted yourself here, the courts, this Court and every court, would be bogged down not in substantive motion practice or substantive issues, weld be bogged down in pettifoggery, because that's what you've been doing all morning, is pettifogging.

The request for attorney's fees is supported by evidence in the record. $175.00 an hour is undoubtedly a reasonable fee in this community. Mr. Siebert so testified. In fact, it's lower than his reasonable fee. And 23 hours initially caused me some hesitation. I wondered how Mr. Hedger could have spent 23 hours on the three discovery motions that I've been considering here.

At the conclusion of four hours listening to you argue, Mr. Smith, and talk about these issues, I now understand exactly how he could spend 23 hours on these matters. And I find that 23 hours is an entirely reasonable amount to be spent on these matters. Indeed, Mr. Hedger has not billed for the time of numerous paralegals. He has not billed for the time of his associates. He has not billed for the time of anybody in his firm other than himself. He has not billed for the

time of in-house counsel at Louisiana-Pacific. So, if anything, the amount of time that he has billed for understates this amount.

In addition, your objection that these are not original records in some sense is bewildering, to say the least. What Mr. Hedger submitted was an affidavit with a summary of his time. He didn't submit anybody else's time. He summarized his time, totalled his time and calculated his time at $175.00 an hour. He did that--those were nothing more than summaries, evidentiary summaries. And he authenticated those summaries in his affidavit, and the evidence on which they were based is Exhibit A and Exhibit B, and they were introduced in court.

There is absolutely no requirement that he produce his original notes for your inspection, nor is there any requirement in the cases concerning attorney's fees that the only competent evidence consists of Mr. Hedger's original diary notes which record his time on this matter and all other matters. It is surely proper for him to produce the billing limited to this particular client, and it's surely proper for him to summarize this in an affidavit. So I find that's another frivolous point that you've made.

The reasonable and necessary attorney's fees in this case amount to $4,060.00. Those attorney's fees were directly caused by the

conduct of the plaintiff's counsel. I find no evidence that the plaintiff has had any involvement herself whatsoever in any of this conduct, so those attorney's fees will be assessed personally against David Smith, the counsel for the plaintiff, and those attorneys fees will be paid no later than July 27th, 1992.

Anything further?

MR. HEDGER: Nothing, Your Honor.

THE COURT: Mr. Smith?

MR. SMITH: Your Honor, will there be a written order?

THE COURT: I have no idea. I've already spent about five hours on this case today. I don't know whether I'm going to do a written order or not. I suggest you order a transcript.

What I may well do--in fact that's a good idea--in case I don't order a written order in this case, for the magistrate's guidance, I am going to require a transcript be prepared, and it will be prepared at your expense, Mr. Smith, and that transcript can be furnished to the magistrate.

MR. SMITH: Your Honor, will you stay execution pending appeal?

THE COURT: No. You can get a stay from the circuit court if you want to.

(10:05 a.m. - Whereupon, the hearing was concluded.)

I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

August 7, 1992

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